Supreme Court, U.S.
FILED

981471 MAR 15 1999

OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

ADVANTAGE WEST PALM BEACH, INC., BERT MOERINGS and MARSHA MOERINGS,

Petitioners,

v.

WEST PALM BEACH COMMUNITY REDEVELOPMENT AGENCY, INC.,

Respondent.

On Petition for Writ of Certiorari to the District Court of Appeal of Florida, Fourth District

PETITION FOR WRIT OF CERTIORARI

ALAN T. DIMOND
ELLIOT H. SCHERKER
Counsel of Record
CHARLES S. KYRIAZOS
BRENDA K. SUPPLE
GREENBERG TRAURIG, P.A.
Attorneys for Petitioners
1221 Brickell Avenue
Miami, Florida 33131
(305) 579-0500

113P

QUESTION PRESENTED

In a series of arms-length transactions, petitioners acquired development rights that were created by the adoption of a municipal development order approving a development of regional impact. The development order granted the original applicant the right to construct offices, retail stores, hotel rooms and dwelling units on a 77-acre parcel of land in West Palm Beach, Florida. At the time that respondent commenced an eminent domain action to take the property and the development rights, petitioners owned a small parcel of the real property and in excess of 900,000 square feet of development rights for the entire parcel. The Florida courts, however, held that petitioners were entitled to compensation *only* for the real property taken by the respondent and that the "floating" development rights held by petitioners have *no compensable value*. The question presented is:

Are intangible development rights created by a governmental development order "property," within the meaning of the Takings Clause of the Fifth Amendment to the United States Constitution, for the taking of which development rights an owner must be compensated by the government in an eminent domain proceeding?

LIST PURSUANT TO RULE 29.6

The petitioners do not have any parent companies or non-wholly owned subsidiaries.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

LIST PURSUANT TO RULE 29.6 ii

TABLE OF CITATIONS v

OPINIONS AND ORDERS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 1

STATEMENT 1

A. The Eminent Domain Proceeding. 1

B. Advantage's Acquisition of the Development Rights. 3

C. The Litigation 6

REASONS FOR GRANTING THE PETITION 8

A. A Governmental Taking of "Development Rights" is a Taking of Property Rights 9

B. The Decision of the Florida Courts to Allow Uncompensated Takings of "Floating" Development Rights is in Conflict With This Court's Precedent on the Value of Severable Development Rights. 13

1. The severability of property rights. 13

TABLE OF CONTENTS
(Continued)

Page

2. The value of transferable development rights..... 14

3. The conflict with this Court's precedent on this important takings issue warrants a grant of certiorari. 19

CONCLUSION..... 23

TABLE OF CITATIONS

Page

Cases

Ansin v. Thurston
101 So. 2d 808 (Fla. 1958).....7

Armstrong v. United States
364 U.S. 40 (1960) 12

Arthur v. Hillsborough County Board of Criminal Justice
498 U.S. 801 (1990).....7

Busch v. Florida
446 U.S. 902 (Fla. 1980).....7

Eastern Enterprises v. Apfel
524 U.S. 498, 118 S. Ct. 2131 (1998) 12

Ibanez v. Florida Department of Professional Regulation, Board of Accountancy
510 U.S. 1067 (1994) 7

Jenkins v. State
385 So. 2d 1356 (Fla. 1980) 7

Kaiser Aetna v. United States
444 U.S. 164 (1979).....9

Louisville Joint Stock Land Bank v. Radford
295 U.S. 555 (1935)..... 12

Lucas v. South Carolina Coastal Council
505 U.S. 1003 (1992) 10, 12

Lynch v. United States
292 U.S. 571 (1934)..... 12

TABLE OF CITATIONS
(Continued)

Page

Macmillan, Inc. v. CF Lex Associates
56 N.Y.2d 386, 452 N.Y.S.2d 377,
437 N.E.2d 1134 (1982) 11

Nollan v. California Coastal Commission
483 U.S. 825 (1987) 11, 12, 13, 14

Palmore v. Sidoti
466 U.S. 429 (1984) 7

Penn Central Transportation Company v.
City of New York
438 U.S. 104 (1978) ..... passim

Pennsylvania Coal Co. v. Mahon
260 U.S. 393 (1922) 11

Phillips v. Washington Legal Foundation
524 U.S. 156, 118 S. Ct. 1925 (1998) 10, 20

Ruckelshaus v. Monsanto Co.
467 U.S. 986 (1984) 12

Seawall Associates v. City of New York
74 N.Y.2d 92, 544 N.Y.S.2d 542,
542 N.E.2d 1059,
cert. denied, 493 U.S. 976 (1989) 14

Suitum v. Tahoe Regional Planning Agency
520 U.S. 725, 117 S. Ct. 1659 (1997) 17, 19, 21

United States v. Causby
328 U.S. 256 (1946) 11

Williams v. Florida
399 U.S. 78 (1970) 7

TABLE OF CITATIONS
(Continued)

Page

Yee v. City of Escondido
503 U.S. 519 (1992) 20

State Constitution

Art. V, § 3(b)(3), Fla. Const. (1980) 7

Statutes

28 U.S.C. § 1257(a) 1

§ 380.06(1), Fla. Stat. (1997) 2

§ 380.031(2), Fla. Stat. (1997) 2

§ 380.06(2)(a), Fla. Stat. (1997) 2

§ 380.06(5)-(20), Fla. Stat. (1997) 2

§ 380.06(15)(b), Fla. Stat. (1997) 2

Other Authorities

BRUCE A. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION 10 (1977) 10

John J. Costonis, *Development Rights Transfer: An Exploratory Essay*
83 YALE L.J. 75 (1973) 15

Richard M. Frank, *Inverse Condemnation Litigation in the 1990s — The Uncertain Legacy of the Supreme Court's Lucas and Yee Decisions*
43 WASH. U. J. URB. & CONTEMP. L. 85 (1993) 12

TABLE OF CITATIONS
(Continued)

Page

MARTIN A. GARRET, JR., LAND USE REGULATION: THE IMPACTS OF ALTERNATIVE LAND USE RIGHTS 76 (1987) 12

Margaret Giordano, Note, *Over-Stuffing the Envelope: The Problems with Creative Transfer of Development Rights* 16 FORDHAM URB. L.J. 43 (1988) 15

Michael B. Hitchcock, *Suitum v. Tahoe Regional Planning Agency: Applying the Takings Ripeness Rule to Land Use Regulations and Transferable Development Rights* 28 GOLDEN GATE U. L. REV. 87 (1998) 21

Julian C. Juergensmeyer, James C. Nicholas & Brian D. Leebrick, *Transferable Development Rights and Alternatives after Suitum* 30 URB. LAW. 441 (1998) 20

Jerold S. Kayden, *Market-Based Regulatory Approaches: A Comparative Discussion of Environmental and Land Use Techniques in the United States* 19 B.C. ENVTL. AFF. L. REV. 565 (1992) 15

Franklin G. Lee, *Transferable Development Rights and the Deprivation of All Beneficial Use: Can TDRs Salvage Regulations That Would Otherwise Constitute a Taking?* 34 IDAHO L. REV. 679 (1998) 21

TABLE OF CITATIONS
(Continued)

Page

Margaret J. Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*
88 COLUM. L. REV. 1667 (1988) 14

David A. Richards, *Downtown Growth Control Through Development Rights Transfer*
21 REAL PROP. PROB. & TR. J. 435 (1986) 15

JULIUS L. SACKMAN, 2 NICHOLS' LAW OF EMINENT DOMAIN
§ 5.01[1] (3rd ed. 1995) 10, 11, 12

Sarah J. Stevenson, *Banking on TDRs: The Government's Role as Banker of Transferable Development Rights*
73 N.Y.U. L. REV. 1329 (1998) 14, 17, 22, 23

Joseph D. Stinson, Note and Comment, *Transferring Development Rights: Purpose, Problems & Prospects in New York*
17 PACE L. REV. 319 (1996) 12

James T. B. Tripp & Daniel J. Dudek, *Institutional Guidelines for Designing Successful Transferable Rights Programs*
6 YALE J. ON REG. 369 (1989) 16

Judith W. Wegner, *Moving Toward the Bargaining Table: Contract Zoning, Development Agreements, and the Theoretical Foundations of Government Land Use Deals*
65 N.C. L. REV. 957 (1987) 15, 22

TABLE OF CITATIONS
(Continued)

Page

Leif Wenar, *The Concept of Property and the Takings Clause*
97 COLUM L. REV. 1923 (1997)..... 10, 14

APPENDIX

Page

Appendix A — Opinion Of The District Court Of Appeal Of The State Of Florida For The Fourth District Dated And Filed October 14, 1998 ..... 1a

Appendix B — Judgment Regarding Development Rights Of The Circuit Court Of The Fifteenth Judicial Circuit, In And For Palm Beach County, Florida Dated September 22, 1997 ..... 4a

Appendix C — Order On Petitioner's Motion In Limine Of The Circuit Court Of The Fifteenth Judicial Circuit, In And For Palm Beach County, Florida Dated September 22, 1997 ..... 11a

Appendix D — Opinion Of The District Court Of Appeal Of The State Of Florida For The Fourth District Denying Rehearing Dated And Filed December 16, 1998 ..... 13a

Appendix E — Excerpts From Agreed Order Of Taking Of The Circuit Court Of The Fifteenth Judicial Circuit Of Florida, In And For Palm Beach County Dated January 6, 1997 ..... 15a

Appendix F — Excerpts From Ordinance No. 2268-89 Of The City Of West Palm Beach, Florida Dated March 20, 1989 ..... 21a

APPENDIX
(Continued)

	Page
Appendix G — Petition In Eminent Domain Dated And Filed June 21, 1996	33a
Appendix H — Motion In Limine Dated March 26, 1997	40a
Appendix I — Collateral Assignment Of Development Rights Dated February 16, 1990	45a
Appendix J — Excerpts From Agreement For The Purchase And Sale Of Real Property Dated June 28, 1991	50a
Appendix K — Absolute Assignment Of Development Rights Dated December 30, 1992	55a
Appendix L — Absolute Assignment Of Development Rights Dated April 15, 1994	59a
Appendix M — Settlement Agreements Dated November 1994 And November 18, 1994	62a
Appendix N — Letters Of Advantage West Palm Beach, Inc. And First Union National Bank Of Florida Dated December 15, 1994	69a
Appendix O — Letter Of The City Of West Palm Beach Dated December 15, 1994	76a

APPENDIX
(Continued)

	Page
Appendix P — Absolute Assignment Of Development Rights Dated December 22, 1994	80a
Appendix Q — Excerpt Of Resolution No. 136-95 Of The City Of West Palm Beach, Florida	85a
Appendix R — Letter Of The City Of West Palm Beach Dated August 4, 1995	87a
Appendix S — Contract Dated June 6, 1996	90a

ON PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, FOURTH DISTRICT

Petitioners Advantage West Palm Beach, Inc., Bert Moerings, and Marsha Moerings respectfully petition for a writ of certiorari to review the judgment and opinion of the District Court of Florida, Fourth District in this cause.

OPINIONS AND ORDERS BELOW

The opinions of the District Court of Appeal of Florida, Fourth District, Appendix A & D, are not yet reported. The opinion of the state trial court, Appendix B, is unreported.

JURISDICTION

The District Court of Appeal of Florida, Fourth District issued its decision on October 14, 1998, Appendix A, and denied rehearing on December 16, 1998, Appendix D. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

STATUTORY PROVISIONS INVOLVED

U.S. CONST. amend. V:

> ... nor shall private property be taken for public use, without just compensation.

STATEMENT

A. The Eminent Domain Proceeding.

The petitioners before the Court are Advantage West Palm Beach, Inc., Bert Moerings, and Marsha Moerings (collectively Advantage). Along with numerous other owners of property rights within a 77-acre parcel of land located in West Palm Beach, Florida, Advantage was named as a respondent in an eminent domain action brought in Florida state court by the West Palm Beach Community Redevelopment Agency (CRA). The CRA sought to condemn the real property, as well as "any and all rights of

development appertaining to said property pursuant to City of West Palm Beach Ordinance No. 2268-89." Appendix G. The cited ordinance was adopted by the City of West Palm Beach on March 6, 1989, to approve an application by an entity known as the Downtown Uptown Venture (DUV) for a Development of Regional Impact (DRI). Appendix F.[1]

The ordinance granted the DUV the rights "to construct 3.7 million square feet of office space, 190,000 square feet of retail, 800 hotel rooms, and 1,000 dwelling units" on a 77-acre parcel of land. Appendix F. Included among the conditions set forth in the ordinance (which constitutes a "development order" under Florida law, §§ 380.031(2), 380.06(15)(b), Fla. Stat. (1997)) is a requirement for individual site plan review by the City for each parcel or portion of a parcel to which the developer seeks to attach development rights. *Id.* at 29a. Expressly set forth in the ordinance is a provision that the development order for the DRI "shall be binding upon and inure to the benefit of the Developer and its assigns or successors in interest and the present owners and their assigns or successors in interest." *Id.* at 31a.

---

[1] A "development of regional impact" is defined by the Florida Legislature as "any development which, because of its character, magnitude, or location, would have a substantial effect upon the health, safety, or welfare of citizens of more than one county." § 380.06(1), Fla. Stat. (1997). The state's land-planning agency is charged with the development of statewide guidelines and standards to be used in determining whether a proposed project should be treated as a DRI. § 380.06(2)(a), Fla. Stat. (1997). The consequence of a development being treated as a DRI is that the developer is required to obtain approval from both the local governmental entity and a regional planning agency. § 380.06(5)-(20), Fla. Stat. (1997).

B. Advantage's Acquisition of the Development Rights.

Advantage, acting through Mr. and Mrs. Moerings, loaned the DUV $1.25 million in 1990, taking back a first mortgage and a collateral assignment of 125,000 square feet of commercial development rights within the DRI. Appendix I. The collateral assignment recites that the City's development order grants to the DUV "certain development rights with respect to the development known as Downtown/Uptown, within which development the subject property is located." *Id.* The collateral assignment pledges "a portion of the development rights" held by the DUV as security for the mortgage debt. *Id.*

After the DUV defaulted on the mortgage loan, resulting in a successful foreclosure action being brought by Advantage, the DUV (acting through a trustee) assigned development rights for 370,000 square feet of office and retail space within the DRI to Advantage in exchange for Advantage's forbearance in the enforcement of the foreclosure judgment. Appendix K. As the DUV continued to encounter financial difficulties (and suffered an adverse decision in a condemnation action brought by the City to obtain title to a right-of-way to which the City asserted entitlement under the terms of the development order), the DUV assigned additional development rights to Advantage in exchange for Advantage's abandonment of the foreclosure judgment and forgiveness of the DUV's debt. Appendix L. The assignment, which was executed on April 15, 1994, is titled "Absolute Assignment of Development Rights." *Id.* Advantage received "the right to utilize" significant additional square footage within the DRI for office space, retail stores, hotel rooms and residential units. *Id.*

Having acquired these development rights, Advantage commenced its efforts to redevelop the DRI, in pursuance of which efforts Advantage entered into a settlement agreement with the DUV. Appendix M. Advantage paid $600,000 to the DUV and received "first-phase

development rights as a separate asset from all real property holdings." *Id.*[2]

Simultaneously with the execution of the Advantage/DUV settlement, the DUV and the City of West Palm Beach settled the condemnation action, which action was then pending on appeal. *Id.* The agreement between the DUV and the City included the City's acknowledgement that development rights created by the DRI had vested. *Id.*

The City thereafter repeatedly acknowledged Advantage's acquisition of the development rights and, indeed, benefited thereby. After the settlement between the City and the DUV, the City was besieged by the DUV's creditors, including First Union National Bank, to which Advantage offered 50,000 square feet of development rights in exchange for a release. Appendix N. At the City's urging, First Union accepted this offer. *Id.* First Union thereafter inquired of the City as to the scope of the development rights transferred to it by Advantage, to which inquiry the City responded that "[t]he development rights under the DRI have purportedly been severed from the ownership of the underlying real estate" by the assignments to Advantage and that the City "will likely require a judicial determination" regarding development rights for any particular parcel within the DRI unless the property owner has secured development rights from Advantage. Appendix O. First Union thereafter secured an assignment of development rights from Advantage, authorizing First Union to use 50,000 square feet of retail space. Appendix P. The City Commission approved First Union's application for site plan approval, allowing the use of the development rights assigned to First Union by Advantage. Appendix Q.

On August 4, 1995, the mayor of West Palm Beach wrote to Mr. Moerings, thanking Advantage for its efforts

---

[2] Advantage agreed to value the development rights at no less than $845,000, and to pay the first $750,000 of the proceeds from any sale of the development rights to the original principals of the DUV. *Id.*

to revitalize the DRI. Appendix R. The mayor stated that the City intended to treat Mr. Moerings and Advantage "fairly in any future transactions ... concerning the City's acquisition of your rights." *Id.* The letter further stated: "It is the City's intention, under any such acquisition process, to pay your Company fair market value for any and all rights which your company may own and which are necessary for assembly and development of the Downtown/Uptown project." *Id.* Shortly before the City instituted its eminent domain action, Advantage sold 60,000 square feet of commercial development rights and an option to purchase an additional 40,000 square feet of rights to a retail furniture store for a total price of $30,000. Appendix S.[3]

---

[3] At trial before the state court, Advantage, presented ample — and uncontradicted — expert testimony to establish that its development rights are subject to valuation in an eminent domain proceeding. A certified real estate appraiser who had been employed by the Federal Deposit Insurance Corporation to assess the value of properties within the DRI testified that the properties, standing alone, had a zero value because of Advantage's ownership of the separate development rights. Transcript at 367-68. This testimony was bolstered by two expert witnesses: a real estate consultant and appraiser who testified that assignments of development rights "significantly affect the potential value of the parcels that might be developed after the rights have been assigned"; and Dr. James Nicholas of the University of Florida, who testified that Advantage's "floating" development rights have independent value and are marketable. Transcript at 172, 179-80. Dr. Nicholas explained that there are "two different types of transfer of development rights": "the formal recognized transfer ... of development rights" (or TDR) and "the informal transfer" between property owners. *Id.* at 167. An informal transfer will usually take place within "a described property or development" where there is multiple ownership of the various properties, as in the Downtown/Uptown DRI, with the price for development rights set by the existing market. The government plays no role in allocating development rights within a DRI because "there is no need" for government intervention. *Id.* at 171-72. The CRA presented no contrary evidence.

C. The Litigation.

After instituting the eminent domain action and securing an order of taking, pursuant to which order the CRA took title to Advantage's development rights, Appendix E, the CRA requested a hearing before the trial court to determine whether Advantage's development rights should be separately valued and Advantage compensated therefor. Appendix H. Following a non-jury trial, the court entered an order declaring that Advantage's development rights are without value. Appendix B.

The court found that the City had not "recognized any development rights" being held by Advantage and that no such rights existed:

> The development rights in question have no value. They were not created by the enactment of the DRI. They do not exist separate and apart from the underlying realty. They were not severable from the realty.
>
> * * *
>
> These "rights" did not exist to be transferred or assigned.

Id. The court accordingly ruled that Advantage had "no separate, compensable property interest known as development rights," and was thus entitled to no compensation for the taking thereof by the CRA. *Id.*

On Advantage's appeal to the District Court of Appeal of Florida, Fourth District, the appellate court approved the trial court's order and held as follows:

> The DRI did not create a species of property known as transferrable development rights. Unlike Palm Beach County, the City of West Palm Beach has never adopted a Transfer of Development Rights Ordinance. Neither the language of the DRI, nor the development process contemplated by the ordinance, support the conclusion that transferrable development

> rights were created for which appellants are entitled to be compensated ....

Appendix A.[4] On Advantage's motion for rehearing, the court stated that its ruling does not mean that the existence

---

[4] Under Florida's two-tiered appellate court structure, the district courts of appeal have always been deemed the "highest state court," with the Florida Supreme Court having only highly-limited (and discretionary) authority to review decisions of the district courts of appeal. *E.g., Jenkins v. State,* 385 So. 2d 1356, 1357-58 (Fla. 1980) (under Florida Constitution, "[i]t was never intended that the district courts of appeal should be intermediate courts"; supreme court functions as "a supervisory body in the judicial system ... exercising power in certain specified areas ... with review by the district courts in most instances being final and absolute") (quoting *Ansin v. Thurston,* 101 So. 2d 808, 810 (Fla. 1958)). This Court accordingly has treated the Florida district courts of appeal as the "highest state court" under Section 1257(a). *E.g., Palmore v. Sidoti,* 466 U.S. 429, 431 (1984); *Williams v. Florida,* 399 U.S. 78, 80 n.5 (1970). Florida litigants who are unsuccessful before a district court of appeal have thus proceeded directly before this Court on certiorari, obtaining review of district court decisions. *E.g., Ibanez v. Florida Department of Professional Regulation, Board of Accountancy,* 510 U.S. 1067 (1994); *Arthur v. Hillsborough County Board of Criminal Justice,* 498 U.S. 801 (1990); *Busch v. Florida,* 446 U.S. 902 (Fla. 1980). The 1980 amendments to the Florida Constitution limited yet more stringently the Florida Supreme Court's jurisdiction, providing that the court may only review a district court of appeal decision "that *expressly and directly* conflicts with a decision of another district court of appeal or of the supreme court on the *same question of law,*" in the absence of a certification by the district court of appeal that its decision should be reviewed by the Florida Supreme Court because a question of great public importance is presented thereby. Art. V, § 3(b)(3), Fla. Const. (1980) (emphasis supplied). Because no Florida appellate decision has ever addressed the compensable nature of severable or "floating" development rights, Advantage's only option for seeking review of the Fourth District's decision in the Florida Supreme Court was by obtaining a certification from the Fourth District that the first decision in this case passes upon a question of great public

(continued . . .)

of a legislative enactment on the transfer of development rights "is a prerequisite to a *compensable* taking of so-called 'floating' development rights." Appendix D.

REASONS FOR GRANTING THE PETITION

THE QUESTION WHETHER SEVERABLE DEVELOPMENT RIGHTS CONSTITUTE "PROPERTY," THE TAKING OF WHICH BY A GOVERNMENTAL ENTITY REQUIRES THE PAYMENT OF JUST COMPENSATION TO THE OWNER OF THE DEVELOPMENT RIGHTS, IS AN IMPORTANT QUESTION OF FEDERAL CONSTITUTIONAL LAW THAT SHOULD BE SETTLED BY THIS COURT.

The City's development order conferred significant rights to develop the property located within the boundaries of the DRI, allowing for the development of almost four million square feet of offices and retail stores, 800 hotel rooms and 1,000 residential units on a 77-acre parcel of property. Those development rights were indisputably taken from Advantage in the CRA's eminent domain action, as set forth in the order of taking. Advantage, however, was denied any opportunity to establish before a jury the value of the lost development rights — because the Florida courts have determined that "[t]he development rights in question *have no value*" as a matter of law. Appendix A (emphasis supplied). While weighty and of significant import, particularly in light of the increasingly-widespread use of transferable development rights as a land-use planning mechanism, the question presented by the rulings in the case is simple and straightforward: do severable or

---

(. . . continued)

interest. Such a request was made to the court in conjunction with Advantage's motion for rehearing and was denied. Appendix D. As a matter of practicality, as well as a matter of law, the Fourth District's decision in this case was that of the "highest state court" with jurisdiction to hear Advantage's appeal.

"floating" development rights created by a governmental entity have compensable value when those rights are taken from the private owner thereof in eminent domain?

A. A Governmental Taking of "Development Rights" is a Taking of Property Rights.

The City's development order conferred on the original DRI developer the right "to construct 3.7 million square feet of office space, 190,000 square feet of retail, 800 hotel rooms, and 1,000 dwelling units" on the 77-acre property comprising the DRI. Appendix F. With the exception of a small area in which non-residential development is barred, the development rights conferred by the DRI are not tied to any particular parcel of land. *Id.* Rather, applications for site plan approval must be submitted to the City for each proposed linkage between the development rights and a particular parcel of real property within the DRI. So it is that the development rights conferred by the DRI are seen by the Florida courts as "'floating' development rights." Appendix D. By the decisions in this case, the Florida courts have established that government may take such "floating" development rights without paying *any* compensation therefor — because such rights "do not exist separate and apart from the underlying realty" and "have *no value*." Appendix A (emphasis supplied).

The notion that development rights may exist separate and apart from real property is, however, inherent in this Court's depiction of the very concept of "property" as a "bundle of rights." *Kaiser Aetna v. United States,* 444 U.S. 164, 176 (1979). Thus, "in law ... property is not things but rights, rights in or to things," and "the bundle of rights idea of property can contain many strands," *e.g.*, "the exclusive right, the use right, air rights, support rights, quiet enjoyment rights, waste rights, and so on." Maureen S. Kordesh, *"I Will Build My House With Sticks": The Splintering of Property Interests Under the Fifth Amendment May be Hazardous to Private Property,* 20 HARV. ENVTL. L. REV. 397, 451 & n.299 (1996) (hereinafter *Splintering of Property Interests*). Simply stated, "property" cannot be defined as "land" alone:

> Instead of defining the relationship between a person and "his" things ... the law of property considers the way rights to things may be parceled out amongst a host of competing resource users. Each resource user is conceived as holding a bundle of rights vis-a-vis other potential users; indeed in the modern American system, the ways in which user rights may be legally packaged and distributed are wondrously diverse ....

BRUCE A. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION 10 (1977) (hereinafter ACKERMAN). This Court recently has reaffirmed this classic definition of property in *Phillips v. Washington Legal Foundation,* 524 U.S. 156, 118 S. Ct. 1925, 1933 (1998).

That is, "[c]onceiving of property as things conjures up the idea that there must be a single owner who holds some standard set of rights over a thing," a notion that "is inadequate to describe the legal realities of the property system." Leif Wenar, *The Concept of Property and the Takings Clause,* 97 COLUM L. REV. 1923, 1927 (1997) (hereinafter *Property and the Takings Clause*). "[T]he law of property concerns itself with bundles of user-rights, not with the awkward idea that things 'belong to' particular people." ACKERMAN, *supra* at 114-15.

"Property," in its most realized sense, means *both* "the corporeal object which is the subject of ownership, as well as the *aggregate* rights which an owner possesses in or with respect to such a corporeal object." JULIUS L. SACKMAN, 2 NICHOLS' LAW OF EMINENT DOMAIN, § 5.01[1] (3rd ed. 1995) (footnotes omitted) (hereinafter NICHOLS). That being so, the right to *develop* property "is a recognized property right and is subject to the power of eminent domain." 2 NICHOLS, § 5.28.

This Court has recognized that, among the economic units included in the "bundle of rights" is the right to *develop* one's land. *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 1019 n.8 (1992) (noting that "our prior takings cases evince an abiding concern for the productive use of, and economic investment in, land");

Nollan v. California Coastal Commission, 483 U.S. 825, 833 n.2 (1987) ("the right to build on one's own property — even though its exercise can be subjected to legitimate permitting requirements — cannot remotely be described as a 'governmental benefit'").[5] Indeed, the recognition of such an inchoate right is all but commanded by the classic formulation of takings law in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), in which decision Justice Holmes declared that the destruction of "previously existing rights of property *and contract*" requires "an exercise of eminent domain and compensation to sustain the act" when

---

[5] Development rights are the modern descendant of "air rights" conferred on landowners under the rubric of *cujus est solum, ejus est usque ad coelum et ad inferos*, or "to whomsoever the soil belongs, he owns also to the sky and to the depths." *Macmillan, Inc. v. CF Lex Associates*, 56 N.Y.2d 386, 452 N.Y.S.2d 377, 437 N.E.2d 1134, 1137 (1982) (citations omitted). With the advent of air travel, "air rights" came to mean that "the landowner ... must have exclusive control of the immediate reaches of the enveloping atmosphere." *United States v. Causby*, 328 U.S. 256, 264 (1946). This Court declared that "[t]he landowner owns at least as much of the space above the ground as he can occupy or use in connection with the land." *Id.* (citation omitted). Thus, "[a]ir rights are incident to the ownership of the surface property — the right of one who owns land to utilize the space above it." *Macmillan*, 437 N.E.2d at 1137. Development rights are viewed as an aspect of "air rights," *i.e.*, "the right of an owner to develop within [the] airspace." 2 NICHOLS, § 5.28

the diminution of value "reaches a certain magnitude." *Id.* at 413 (emphasis supplied).[6]

With the *Lucas* and *Nollan* decisions, this Court not only reaffirmed that the opportunity to develop one's land is included in the "bundle of rights," but elevated the status of development rights. Richard M. Frank, *Inverse Condemnation Litigation in the 1990s — The Uncertain Legacy of the Supreme Court's Lucas and Yee Decisions*, 43 WASH. U. J. URB. & CONTEMP. L. 85, 108-09 (1993). The preeminence of development rights is to be expected in a market-driven economic structure:

> The ownership of property, in and of itself, is of little value to an individual. Instead, *it is the owner's ability to put that property to a particular use* that creates value in property.

Joseph D. Stinson, Note and Comment, *Transferring Development Rights: Purpose, Problems & Prospects in New York*, 17 PACE L. REV. 319, 322 (1996) (emphasis supplied; footnote omitted) (hereinafter *Transferring Development Rights*). So it is that "other than in most agricultural and mining areas, the right to develop *is probably the component of greatest value among the rights to ownership.*" MARTIN A. GARRET, JR., LAND USE REGULATION: THE IMPACTS OF ALTERNATIVE LAND USE RIGHTS 76 (1987) (hereinafter GARRET) (emphasis supplied); *accord*, 2 NICHOLS, § 5.28[1] n.8 ("[it] seems clear that the greatest component of value of ...

---

[6] This Court's takings decisions historically have recognized that both tangible *and* intangible property interests may be "taken" so as to entitle the holder of the interest to compensation. *E.g., Eastern Enterprises v. Apfel*, 524 U.S. 498, 118 S. Ct. 2131, 2147-49 (1998) (employer's liability for health benefits); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1002-03 (1984) (trade secrets); *Armstrong v. United States*, 364 U.S. 40, 44-46 (1960) (materialmen's liens); *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 596-602 (1935) (real estate liens); *Lynch v. United States*, 292 U.S. 571, 579 (1934) (contracts).

undeveloped land in an urban area would be the development rights").

The central tenet of the Florida courts' rulings on Advantage's development rights runs completely counter to the very *definition* of "property" and to this Court's firm recognition that development rights *are* "property" under the Takings Clause. The notion that a governmental entity can confer on a property owner clearly-stated rights to develop the property in certain ways and, upon taking those rights in an eminent domain proceeding, be exempt from the constitutional requirement of paying just compensation, is breathtaking in its potential for depriving private property owners of rights that appertain to their property without *any* obligation on the government's part to pay just compensation.

B. The Decision of the Florida Courts to Allow Uncompensated Takings of "Floating" Development Rights is in Conflict With This Court's Precedent on the Value of Severable Development Rights.

1. The severability of property rights.

In *Nollan*, this Court expressly acknowledged the severability of property rights. The Court struck down a condition that had been imposed on the landowner's right to develop beachfront property, which condition required dedication of a right of public access through the property. The Court construed the mandatory easement as a separately-taken right, independent of the parcel of land:

> To say that the appropriation of a public easement across a landowner's premises does not constitute the taking of a property interest but rather ... "a mere restriction on its use" is to use words in a manner that deprives them of all their ordinary meaning.

483 U.S. at 831.

The *Nollan* analysis has been labeled as "conceptual severance," *i.e.*, "delineating a property interest consisting

of just what the government action has removed from the owner, and then asserting that that particular whole thing has been permanently taken." Margaret J. Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 COLUM. L. REV. 1667, 1676 (1988) (hereinafter *Cross Currents*). Because each "stick" in the "bundle of rights" is "property," then "removing a stick from someone's bundle must be a taking regardless of what other sticks remain in the person's bundle (if any)." *Property and the Takings Clause, supra* at 1928 (footnote omitted). The *Nollan* framework thus "conceptually 'severs' from the whole bundle of rights just those strands that are interfered with by the regulation, and then hypothetically or conceptually construes those strands in the aggregate as a separate whole thing." *Cross Currents, supra* at 1676.[7] Like other rights in the "bundle of sticks" that constitute property, "development rights are property rights that can be severed from land and sold." Sarah J. Stevenson, *Banking on TDRs: The Government's Role as Banker of Transferable Development Rights*, 73 N.Y.U. L. REV. 1329 (1998) (hereinafter *Banking on TDRs*).

2. The value of transferable development rights.

Transferable development rights (TDRs) are a well-recognized mechanism that is used to separate development rights from real property. TDRs are employed to limit development in sensitive or overcrowded areas by transferring rights to develop in such areas to real property

---

[7] The rationale for *Nollan* also has been interpreted as market-driven, *i.e.*, if an economic unit of property can be exchanged for value, that unit may be severed from the "bundle of rights." *The Splintering of Property Interest, supra* at 427, 433-34. The New York Court of Appeals took that view of *Nollan* in *Seawall Associates v. City of New York*, 74 N.Y.2d 92, 544 N.Y.S.2d 542, 542 N.E.2d 1059, *cert. denied*, 493 U.S. 976 (1989), holding that "development rights which have been totally abrogated ... are, *standing alone*, valuable components of the 'bundle of rights'" that constitute property. *Id.* at 1067-68 (emphasis supplied).

located in areas more conducive to further development. John J. Costonis, *Development Rights Transfer: An Exploratory Essay*, 83 YALE L.J. 75, 85-86 (1973). Thus, "[b]orrowing from the metaphor of property as a bundle of sticks, such programs classify the right to develop as a stick capable of being severed from geographically specific sites and sold like a fungible commodity." Jerold S. Kayden, *Market-Based Regulatory Approaches: A Comparative Discussion of Environmental and Land Use Techniques in the United States*, 19 B.C. ENVTL. AFF. L. REV. 565, 574-75 (1992) (footnote omitted) (hereinafter *Market-Based Regulatory Approaches*). TDR programs "are premised on the notion that development rights in land *are themselves distinct property entities* and, as such, are *freely separated from conventional rights of ownership.*" Judith W. Wegner, *Moving Toward the Bargaining Table: Contract Zoning, Development Agreements, and the Theoretical Foundations of Government Land Use Deals*, 65 N.C. L. REV. 957, 1002 n.265 (1987) (citation omitted; emphasis supplied) (hereinafter *Contract Zoning*).

This Court first addressed TDRs in *Penn Central Transportation Company v. City of New York*, 438 U.S. 104 (1978). New York City has been "the nation's laboratory" for TDR experimentation since that city's adoption of its first modern zoning code in 1961. David A. Richards, *Downtown Growth Control Through Development Rights Transfer*, 21 REAL PROP. PROB. & TR. J. 435, 437 (1986). TDRs were originally used in New York to allow the transfer of development rights between contiguous parcels, and, under a 1968 amendment, "landmark" buildings were permitted to transfer unused "air rights" to a site across a street from the "landmark" building. Margaret Giordano, Note, *Over-Stuffing the Envelope: The Problems with Creative Transfer of Development Rights*, 16 FORDHAM URB. L.J. 43, 47 (1988) (hereinafter *Creative Transfer*). *Id.*[8]

---

[8] TDRs have been used successfully to preserve New Jersey's Pinelands wilderness area through the granting of TDRs to landowners in areas of limited development. James T. B. Tripp & Daniel J. Dudek, *Institutional Guidelines for Designing*

(continued . . .)

In *Penn Central*, this Court addressed New York's TDR program for preservation of municipal landmarks. The dispute arose from proposals to use the "air rights" over Grand Central Terminal for a multi-story office building above the terminal. 438 U.S. at 115-18. The City refused to allow the new building, largely because of its incompatibility with the historic terminal, and granted Penn Central TDRs that could have been used to develop office buildings on other properties owned by Penn Central. *Id.* at 116-19. Pressing its claim of a taking without just compensation, Penn Central conceded that the TDRs "are valuable," but asserted that a taking nonetheless had occurred. *Id.* at 129.

The Court held that denying Penn Central "the ability to exploit a property interest that they heretofore had believed was available for development" did not itself constitute a taking. 438 U.S. at 130. Additionally, Penn Central was permitted under the New York law to continue using the terminal "precisely as it has been used for the past 65 years: as a railroad terminal containing office space and concessions." *Id.* at 136. Finally, while declining to address the question whether TDRs may constitute "just compensation" under the Fifth Amendment (because no "taking" that would entitle Penn Central to compensation had yet occurred), *id.* at 122, the Court relied on the value of the TDRs granted to Penn Central to bolster its conclusion that a taking had not occurred:

(. . . continued)

Successful Transferable Rights Programs, 6 YALE J. ON REG. 369, 378-80 (1989). The Pinelands program grants credits to landowners, which credits can be sold to developers for use in obtaining additional density in growth areas of the state. *Id.* at 378. Other successful TDR programs are operating in New Jersey's Hackensack Meadowlands, the Long Island Pine Barrens of New York, the Santa Monica Mountains, and the eastern boundary of the Florida Everglades. Julian C. Juergensmeyer, James C. Nicholas & Brian D. Leebrick, *Transferable Development Rights and Alternatives after Suitum*, 30 URB. LAW. 441, 448-55 (1998).

> [T]o the extent appellants have been denied the right to build above the Terminal, it is not literally accurate to say that they have been denied all use of even those pre-existing air rights. Their ability to use these rights has not been abrogated; they are made transferable to at least eight parcels in the vicinity of the Terminal, one or two of which have been found suitable for the construction of new office buildings. Although appellants and others have argued that New York City's transferable development-rights program is far from ideal, the New York courts here supportably found that, at least in the case of the Terminal, the rights afforded are valuable. While these rights may well not have constituted "just compensation" if a "taking" had occurred, the rights nevertheless undoubtedly mitigate whatever financial burdens the law has imposed on appellants and, for that reason, are to be taken into account in considering the impact of regulation.

Id. at 137 (citation and footnote omitted). This Court's "implicit acceptance of TDRs in *Penn Central* was an extremely important step for TDRS" because the decision "signaled to New York City, and the rest of the country, not only that this new form of TDR was an acceptable land use tool, but also that TDRs *had some recognizable value* that could mitigate financial hardship." *Banking on TDRs, supra* at 1336 (footnote omitted; emphasis supplied).

This Court's decision in *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, 117 S. Ct. 1659 (1997), reaffirms that TDRs are separately valuable, with their value subject to reasonable calculation. *Suitum* arose from a landowner's takings claim, which claim resulted from an interstate agency's ruling that her Nevada property was not subject to development because of its location in an environmentally sensitive area. 117 S. Ct. at 1161-63. The landowner received TDRs as compensation for the ruling by the agency, but brought her takings action prior to making any effort to market the TDRs. *Id.* at 1663-64. The Court addressed the question whether the landowner's

"claim of a regulatory taking of her land ... is ready for judicial review under prudential ripeness principles." *Id.* at 1664 (footnote omitted). In holding that the claim was ripe, the landowner's decision not to market the TDRs notwithstanding, the majority opinion addressed the agency's argument that the claim was not ripe because no precise values could be attributed to the TDRs. *Id.* at 1668.

The Court recognized that "TDRs may be bought and used for the benefit of all sorts of land parcels and lots." *Id.* at 1668. The agency's argument was thus rejected because, as the Court held, "[t]he valuation of Suitum's TDRs is ... simply *an issue of fact* about possible market prices." *Id.* (emphasis supplied). While Justice Scalia's separate opinion argues that the value of Suitum's TDRs is irrelevant to the question of ripeness and that the TDRs should be considered only in determining the amount of compensation to which Suitum should be entitled, *id.* at 1670-72, both the majority and Justice Scalia *agreed* on the answer to the underlying question, *i.e.*, whether TDRs have inherent value in the first instance. As Justice Scalia observes:

> TDRs, of course, have nothing to do with the use or development of the land to which they are (by regulatory decree) "attached." The right to use and develop one's own land is quite distinct from the right to confer upon someone else an increased power to use and develop his land. *The latter is valuable, to be sure,* but it is a new right conferred upon the landowner in exchange for the taking, rather than a reduction of the taking. In essence, the TDR permits the landowner whose right to use and develop his property has been restricted or extinguished to extract money from others ....
>
> * * *
>
> ... TDRs can serve a commendable purpose in mitigating the economic loss suffered by an individual whose property use is restricted, and property value diminished, but not so substantially as to produce a compensable

> taking. They may also form a proper part, or indeed the entirety, of the full compensation accorded a landowner when his property is taken ....

Id. at 1671-72 (emphasis supplied). The disagreement over the proper placement of TDRs in the context of a regulatory taking notwithstanding, the Court thus spoke with a single voice in *Suitum* on the question whether TDRs are *valuable property rights*.

3. The conflict with this Court's precedent on this important takings issue warrants a grant of certiorari.

The Florida courts' rulings in this case cannot be reconciled with this Court's decisions in *Penn Central* and *Suitum*.[9] The CRA's eminent domain petition sought to condemn "all *rights of development* appertaining to [the DRI] property" pursuant to the ordinance that adopted the development order. Appendix G (emphasis supplied). The state court's initial order of taking expressly provides that the CRA took *Advantage's development rights*, as assigned in the various agreements that led to Advantage's

---

[9] The initial opinion by the Fourth District Court of Appeal strongly suggests that the existence of a TDR ordinance in the jurisdiction that confers severable development rights is dispositive of the question whether those rights have value upon a taking thereof in an eminent domain proceeding. Appendix A. When the anomaly of such a holding was raised by Advantage on rehearing, the court stated that its decision did *not* hold that "the existence of an enactment controlling the transfers of development rights ... is a prerequisite to a *compensable* taking of so-called 'floating' development rights," but rather that the decision had been "predicated entirely on the specific language of the subject DRI Development Order." Appendix D. This is a distinction without a meaningful difference: either way, the court is saying that the absence of an express creation of TDRs by a local governmental body is dispositive of the question whether a taking of development rights is compensable.

acquisition of the original developer's rights. Appendix E. The question thus presented is *not* whether, as in the regulatory-takings scenario, a "taking" of property has occurred. Rather, the *only* question is whether property that indisputably has been taken by a governmental entity has compensable value. *See, e.g., Yee v. City of Escondido,* 503 U.S. 519, 522 (1992) (just compensation clause is implicated by physical seizure *or* the taking of title thereto).

The only conceivable distinction between TDR exchanges and more informal transfers of development rights, such as occurred in the present case, is that the latter transaction is entirely private and takes place without the need for government intervention.[10] A property owner's Fifth Amendment right to just compensation for property that is taken by the government cannot rest upon whether the condemning entity formally has recognized the transaction by which the owner obtained the property being taken by the government. *See Phillips,* 118 S. Ct. at 1931 (government "may not sidestep the Takings Clause by disavowing traditional property interests long recognized under state law").

By their very nature, "TDR programs *separate the development potential from the land itself* and create a market where that *development potential* can be sold." Julian C. Juergensmeyer, James C. Nicholas & Brian D. Leebrick, *Transferable Development Rights and Alternatives after Suitum,* 30 URB. LAW. 441, 446 (1998) (footnote omitted; emphasis supplied). TDRs are thus nothing more or less than development rights created by

---

[10] Indeed, it cannot escape notice that the development rights obtained by Advantage were thereafter transferred by Advantage to another property owner within the DRI — at the urging of the City of West Palm Beach, which was seeking to resolve outstanding claims against the original development. Appendix O. The City was fully aware of Advantage's acquisition and marketing of the development rights and professed, at least at one point, its intention to pay Advantage "fair market value" for any development rights that the City thereafter sought to acquire. Appendix R.

governmental action that "effectively equal the traditional right to use or develop real property." Franklin G. Lee, *Transferable Development Rights and the Deprivation of All Beneficial Use: Can TDRs Salvage Regulations That Would Otherwise Constitute a Taking?*, 34 IDAHO L. REV. 679, 707 (1998).

The close relationship between TDRs and Advantage's "floating" development rights is highlighted in a discussion of the Lake Tahoe Basin land-use restrictions following this Court's *Suitum* decision. Michael B. Hitchcock, *Suitum v. Tahoe Regional Planning Agency: Applying the Takings Ripeness Rule to Land Use Regulations and Transferable Development Rights*, 28 GOLDEN GATE U. L. REV. 87 (1998) (hereinafter *Applying the Takings Ripeness Rule*). As noted in the discussion of the DRI development order, the development rights conferred therein do not attach to a particular parcel until site plan approval is granted for a specific development. Appendix F. Similarly, TDRs in the Lake Tahoe Basin are "a development right because they represent a fractional share of the cumulative development allowed for the entire region." *Applying the Takings Ripeness Rule, supra* at 110. When allocated "to individual parcels," the TDRs "may then become vested property rights upon development application approval." *Id.* Stated otherwise, TDRs — like Advantage's development rights — begin as *unattached* rights that pertain to a *region* that is subject to governmental regulation, and only become actualized upon governmental approval for application to a particular parcel of land. There is thus neither a conceptual nor a legal distinction between TDRs and Advantage's rights for the purpose of a takings analysis.

If indeed TDRs have calculable value, as this Court has held that they do in *Penn Central* and *Suitum*, the holding below that Advantage's "floating" development rights, which rights were created by the ordinance establishing the DRI, cannot have any value is in direct and irreconcilable conflict with this Court's takings precedent. It cannot be overlooked that the DRI ordinance that created the development rights expressly contemplated that those rights *would be subject to assignment*. Appendix F. Prior

to the taking of its development rights by the CRA, Advantage was in possession of *valuable rights* — as is irrefutably established by Advantage's sale of portions of its rights on the open market. After the taking, Advantage's development rights were somehow deemed to be of *no value,* such that the government was able to bar Advantage from proving the value of the taken rights before a jury.

The importance of the question presented by this case and the conflict with this Court's precedent warrant review by this Court. State and local governments are making frequent use of development agreements, similar to the DRI development order at issue in this case, as land-use planning tools. *Contract Zoning, supra* at 994-98. Development agreements are used, among other things, to facilitate the preservation of agricultural land, and — as here — "to foster community redevelopment." *Id.* at 994-95. Such agreements are intended "to increase certainty concerning the rights of developers — an objective that is satisfied only by the recognition of protected property or contract rights — and to facilitate the production of needed public infrastructure an other benefits — arguably above and beyond that which the local government could exact under the police power." *Id.* at 999-1000 (footnote omitted). If a governmental change of heart, as expressed in an eminent domain action, can strip away valuable development rights conferred by a development order or agreement without the need of just compensation, the utility of this valuable planning tool will be significantly limited, if not all but destroyed.

Moreover, the decision below, if left undisturbed, could have a negative impact on the development of TDR programs as well. Despite the value of TDRs in fostering "a variety of preservation efforts, including the preservation of historic landmarks, valuable ecosystems, agricultural land, open space, and low-income housing," governmental use of TDRs continues to encounter obstacles, "the most significant of which is difficulty in valuation." *Banking on TDRs, supra* at 1331 & n.10. Landowners often find it difficult to locate willing buyers for TDRs conferred by government as compensation for regulatory takings, due in part to the absence of an

established exchange and also to the reluctance of other landowners to purchase TDRs. *Id.* at 1331. The added uncertainty that is created by allowing the government to use its power of eminent domain specifically to take back rights that it bestowed on a property owner, without the government also being subject to the just compensation requirements of the Fifth Amendment, will thwart efforts to use this "desirable land use tool," *Banking on TDRs, supra* at 1331, for legitimate public purposes.

CONCLUSION

The petition for a writ of certiorari should be granted.

Alan T. Dimond, Esq.
Elliot H. Scherker, Esq.
Counsel of Record
Charles S. Kyriazos, Esq.
Brenda K. Supple, Esq.
Greenberg Traurig, P.A.
1221 Brickell Avenue
Miami, Florida 33131
Telephone: (305) 579-0500

Counsel for Advantage West Palm Beach, Inc., Bert Moerings and Marsha Moerings

Dated: March 12, 1999

APPENDIX

APPENDIX A — OPINION OF THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA FOR THE FOURTH DISTRICT DATED AND FILED OCTOBER 14, 1998

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA

FOURTH DISTRICT JULY TERM 1998

ADVANTAGE WEST PALM BEACH, INC., BERT MOERINGS, and MARSHA MOERINGS,

Appellants,

v.

WEST PALM BEACH COMMUNITY REDEVELOPMENT AGENCY, INC.,

Appellee.

CASE NO. 97-3525

Opinion filed October 14, 1998

Appeal from the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County; Edward Fine, Judge; L.T. Case No. CL 96-5381 AI.

* * *

Appendix A

PER CURIAM.

The issue in this case is whether appellants are entitled to compensation for certain "development rights" as part of a taking in eminent domain. Appellants contended that these development rights were created by City of West Palm Beach Ordinance No. 2268-89, as amended, referred to as the Downtown Uptown Development of Regional Impact ("DRI"). After a three-day trial on this issue, the trial court entered a concise, well reasoned final judgement which held:

> The development rights in question have no value. They were not created by the enactment of the DRI. They do not exist separate and apart from the underlying realty. They were not severable from the realty.
>
> Neither the City nor the Community Redevelopment Agency is estopped in any way from contesting the assignability or value of the subject development rights assigned to Advantage.
>
> These "rights" did not exist to be transferred or assigned.
>
> [Appellants], Advantage West Palm Beach, Inc., Bert Moerings and Marsha Moerings hold no separate, compensable property interest known as development rights, are due no compensation from the West Palm Beach Community Redevelopment Agency and hold no apportionment claim against the owners of land within the DRI.

Appendix A

We agree with the final judgment entered by the trial court. The DRI did not create a species of property known as transferrable development rights. Unlike Palm Beach County, the City of West Palm Beach has never adopted a Transfer of Development Rights Ordinance. Neither the language of the DRI, nor the development process contemplated by the ordinance, support the conclusion that transferrable development rights were created for which appellants are entitled to be compensated. The opaque references by the City's attorney during a closing argument in a different case did not give rise to an estoppel against inconsistent positions. This is not the rare and exceptional case that justifies the application of the doctrine of equitable estoppel. *See State Dep't of Revenue v. Anderson*, 403 So. 2d 397, 400 (Fla. 1981).

AFFIRMED.

POLEN, GROSS and TAYLOR, JJ., concur.

NOT FINAL UNTIL THE DISPOSITION OF ANY TIMELY FILED MOTION FOR REHEARING.

APPENDIX B — JUDGMENT REGARDING DEVELOPMENT RIGHTS OF THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT, IN AND FOR PALM BEACH COUNTY, FLORIDA DATED SEPTEMBER 22, 1997

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT, IN AND FOR PALM BEACH COUNTY, FLORIDA

CASE NO. CL 96-5381 AI

WEST PALM BEACH COMMUNITY REDEVELOPMENT AGENCY,

Plaintiff,

vs.

ADVANTAGE WEST PALM BEACH, INC., et al.,

Defendants.

JUDGMENT REGARDING DEVELOPMENT RIGHTS

This cause came before the Court pursuant to a non-jury trial conducted on August 18, 19 and 25, 1997. The purpose of the trial was to resolve whether development rights created pursuant to City of West Palm Beach Ordinance No. 2268-89, and the amendments thereto (i.e., City of West Palm Beach Ordinance Nos. 2287-89 and 2313-89), regarding the Downtown Uptown Development of Regional Impact (the "DRI"), constitute a type of property interest, apart from the realty within the DRI, with respect to which Petitioner, the

Appendix B

West Palm Beach Community Redevelopment Agency ("Petitioner"), is required to provide "full compensation" under Article X of the Florida Constitution.

On or about January 6, 1997, the Court entered an Agreed Order of Taking whereby Petitioner obtained title to certain real property belonging to: Advantage West Palm Beach, Inc., Bert Moerings and Marsha Moerings (collectively, Advantage), along with "all development, contract and other rights held, or allegedly held, by Defendant, Advantage West Palm Beach . . ." pursuant to Florida Statutes Chapter 74. (Order of Taking, ¶5, pp. 8-9). On or about March 26, 1997, the City filed a motion *in limine* wherein it asserted that "numerous issues exist in this cause as to the validity and effect, if any, of the . . . purported assignments of development rights" to Advantage. (Pet.'s Mot., p.3). The City's motion further asserted that "as a matter of law" the Court is required to determine prior to the trial of this case:

A. Whether the so-called development rights could have been severed from the underlying real estate within the DRI;

B. Whether development rights are a species of property which may exist independent of any real property when all of the real property has been transferred to others;

C. Whether the purported assignments of development rights were and continue to be valid; and

D. Whether the parties must value the so-called development rights as severed from the realty and compensate Defendant, Advantage West Palm Beach, therefore.

(Pet.'s Mot., ¶ 8, pp. 3-4).

In response to Petitioner's motion *in limine*, Advantage asserted a series of fundamental procedural and substantive objections contending that Petitioner was attempting by its motion *in limine* to thrust wrongfully upon Advantage a trial under the guise of a motion *in limine* without the basic notice (or discovery) required by the Florida Rules of Civil Procedure. At the May 20, 1997 hearing on Petitioner's motion *in limine*, the Court acknowledged the propriety of Advantage's objections and determined that a properly noticed trial on the matters raised by Petitioner's motion was necessary. The Court allowed sufficient time for discovery and preparations to be completed.

Land regulation constitutes an exercise of the police power of government. The development order in this case restricts the use of private property. In this instance the development order authorized certain densities for both commercial and residential use. The development order did not actually place specific densities on specific properties but, with the exceptions of Blocks 3 and 10 which were close to a residential area, it merely allocated total densities for the area in general. Any developer of the property within the DRI would still have to obtain site plan approval for any specific land development contemplated.

Appendix B

Prior to the mortgaging of any of the property in question the development order was enacted as a municipal ordinance and was a matter of public record. The development order does not contain the term "development rights". It does not address development rights at all. It does not make any provisions for the transfer of development rights or for their severance or separation from the underlying real estate. The City of West Palm Beach has never adopted an ordinance permitting or regulating the transfer of development rights.

Shortly after the adoption of the development order in March 1989, the original developer entered into several mortgage transactions. Every one of these mortgage transactions pledged fee simple title as security for these loans. Thereafter the project became financially troubled. Ultimately the mortgages were foreclosed. All title presently held by all the interested land owners was acquired by these mortgage foreclosures or by subsequent purchase of title acquired by means of these mortgage foreclosures.

After the passage of the development order, and after execution of the mortgages but before the mortgages were foreclosed, the original owners of the property conveyed the development rights which are the subject of this Judgment, to Advantage West Palm Beach, Inc., Bert Moerings and Marsha Moerings. Defendants own about 5% of the land within the DRI but they claim to own approximately 90% of all development rights.

Advantage claims that the City has acknowledged in their dealings with land owners that these rights have value by requiring that owners obtain development rights from

Advantage or litigate the matter. Advantage sold development rights to Babcock's Economy Furniture Stores, Inc., a land owner within the DRI that was in the process of obtaining approval for the construction of a large office building. The Court finds that the City has not recognized any development rights but instead recognized that the claim that development rights existed clouded the land titles within the DRI so that the parties were obligated to either litigate the matter or reach an agreement with Advantage since either action resolved the title issue.

First Union Bank by a related entity known as O.R.E.O., Inc. acquired 50,000 square feet of development rights from Advantage. This was acquired as part of a settlement that involved the City, First Union and Advantage. Again since the validity of the claim of Advantage was undetermined, either O.R.E.O, Inc. would have to undertake its own litigation to obtain a judicial determination, or satisfy Advantage so that there could be no potential claim by Advantage.

The City's position in the litigation of the Okeechobee corridor was that if the parcels in question were owned by one entity, its development rights could be placed on the various parcels according to the owner's discretion, provided that development did not exceed the maximum allowed by the DRI. This is not inconsistent with the City's present position. Consequently, there is no estoppel operating against the City.

The assignments of development rights were acquired without the consent of any of the mortgage holders, and

without the consent of the City of West Palm Beach. Many of the assignments were unrecorded and would not surface in a normal title examination. If these development rights in fact remove the right of an owner to develop property then Advantage without purchasing any of the land in question would be in a position to prohibit the owners from the development of their land.

The Court finds that the prior unitary owners within the DRI having pledged fee simple title to their mortgagees, could not strip off development rights. Development rights were not separate intangibles created by the passage of the DRI.

CONCLUSIONS OF LAW:

The development rights in question have no value. They were not created by the enactment of the DRI. They do not exist separate and apart from the underlying realty. They were not severable from the realty.

Neither the City nor the Community Redevelopment Agency is estopped in any way from contesting the assignability or value of the subject development rights assigned to Advantage.

These "rights" did not exist to be transferred or assigned.

Defendants, Advantage West Palm Beach, Inc., Bert Moerings and Marsha Moerings hold no separate, compensable property interest known as development rights, are due no compensation from the West Palm Beach Community Redevelopment Agency and hold no

apportionment claim against the owners of land within the DRI.

ORDERED AND ADJUDGED at West Palm Beach, Florida, this 22 day of September, 1997.

s/ Edward Fine
EDWARD FINE
Circuit Judge

APPENDIX C — ORDER ON PETITIONER'S MOTION IN LIMINE OF THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT, IN AND FOR PALM BEACH COUNTY, FLORIDA DATED SEPTEMBER 22, 1997

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT, IN AND FOR PALM BEACH COUNTY, FLORIDA

CASE NO. CL 96-5381 AI

WEST PALM BEACH COMMUNITY REDEVELOPMENT AGENCY,

Plaintiff,

vs.

ADVANTAGE WEST PALM BEACH, INC., et al.,

Defendants.

ORDER ON PETITIONER'S MOTION IN LIMINE

This action came before the Court on August 18, 19 and 25, 1997 on Petitioner's Motion in Limine. The motion raises the question: whether or not the Defendants, Advantage West Palm Beach, Inc., Burt Moerings and Marsha Moerings may present a claim to the jury for compensation for certain claimed real and intangible property interests designated by them as development rights. Pursuant to the decision of the Court regarding those rights, finding that they have no compensative value, the motion seeking to prohibit the introduction of this claim to the jury is hereby granted.

Appendix C

ORDERED at West Palm Beach, Florida, this 22 day of September, 1997.

s/ Edward Fine
EDWARD FINE
Circuit Judge

APPENDIX D — OPINION OF THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA FOR THE FOURTH DISTRICT DENYING REHEARING DATED AND FILED DECEMBER 16, 1998

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA

FOURTH DISTRICT JULY TERM 1998

ADVANTAGE WEST PALM BEACH, INC., BERT MOERINGS, and MARSHA MOERINGS,

Appellants,

v.

WEST PALM BEACH COMMUNITY REDEVELOPMENT AGENCY, INC.,

Appellee.

CASE NO. 97-3525

Opinion filed December 16, 1998

Appeal from the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County; Edward Fine, Judge; L.T. Case No. CL 96-5381 AI.

* * *

Appendix D

ON MOTION FOR REHEARING AND/OR EN BANC REHEARING AND FOR CERTIFICATION

PER CURIAM.

Appellants' motions for rehearing, rehearing en banc, and for certification are denied. Appellants misread the panel opinion when they assert that the decision "plainly states that the existence of an enactment controlling the transfers of development rights (TDRs) is a prerequisite to a *compensable* taking of so-called "floating" development rights." As appellee correctly points out, the panel opinion is "predicated entirely on the specific language of the subject DRI Development Order."

POLEN, GROSS and TAYLOR, JJ., concur.

APPENDIX E — EXCERPTS FROM AGREED ORDER OF TAKING OF THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR PALM BEACH COUNTY DATED JANUARY 6, 1997

IN THE CIRCUIT COURT OF THE
15TH JUDICIAL CIRCUIT OF FLORIDA,
IN AND FOR PALM BEACH COUNTY.

CASE NO. CL 96-5381 AI

Parcels 701, 707, 709, 6904, RB-1, RB-2,
RB-4, RB-5, RB-6 and Claims to Development
and Other Rights Under DRI

WEST PALM BEACH COMMUNITY
REDEVELOPMENT AGENCY,

Petitioner,

vs.

ADVANTAGE WEST PALM BEACH, INC., et al.,

Respondents,

AGREED ORDER OF TAKING

THIS CAUSE came before the Court under the Petition in Eminent Domain, Amendment to Petition in Eminent Domain and Answer with Affirmative Defenses filed by Defendant, ADVANTAGE WEST PALM BEACH, INC., BERT MOERINGS and MARSHA MOERINGS, (hereinafter

collectively referred to as ADVANTAGE WEST PALM BEACH), and it appearing that proper notice was first given to all the Defendants and to all persons having or claiming any equity, lien, title or other interest in or to the property described herein that the Petitioner would apply to this Court for an Order of Taking and upon agreement of Petitioner and Defendant, ADVANTAGE WEST PALM BEACH, and the Court being fully advised in the premises, upon consideration, it is, therefore,

ADJUDGED:

1. That the Court has jurisdiction of the subject matter of and the parties to this cause;

2. That the pleadings in this cause are sufficient, and the Petitioner is properly exercising its delegated authority;

3. That each Estimate of Value filed in this cause by the Petitioner was made in good faith and based upon a valid appraisal;

4. That upon the payment of the deposit hereinafter specified into the Registry of this Court, fee simple title shall vest in the Petitioner in the following properties:

* * *

5. That a dispute exists between the parties hereto as to the ownership, validity and value, if any, of certain development rights, contract rights and other rights allegedly owned by Defendant, ADVANTAGE WEST PALM BEACH,

pursuant to the Downtown/Uptown Development of Regional Impact as adopted by City of West Palm Beach Ordinance No. 2268-89, as amended, and as more fully set forth by ADVANTAGE WEST PALM BEACH in its Answer filed herein. It is agreed that upon payment of the total sum of money set forth in Paragraph 7 below that full and complete title to all development, contract and other rights held, or allegedly held, by Defendant, ADVANTAGE WEST PALM BEACH, pursuant to the development of regional impact, as amended, shall vest in Petitioner, including but not limited to, all rights allegedly held by Defendant, ADVANTAGE WEST PALM BEACH, pursuant to the following:

A. Absolute Assignment of Development Rights as recorded in Official Record Book 8557, page 267 of the Public Records of Palm Beach County, Florida.

B. Absolute Assignment of Development Rights as recorded in Official Record Book 8557, page 269 of the Public Records of Palm Beach County, Florida.

C. Assignment of Contract Rights as recorded in Official Record Book 9261, page 367 of the Public Records of Palm Beach County, Florida.

D. First Amendment Assignment of Contract Rights and Clarification of December 22, 1994 Assignment of Contract Rights as recorded in official Record Book 9261, page 431 of the Public Records of Palm Beach County, Florida.

E. Certificate of Title as recorded in official Record Book 9302, page 1824 of the Public Records of Palm Beach County, Florida.

Appendix E

F. Absolute Assignment of Development Rights as recorded in Official Record Book 9308, page 1420 of the Public Records of Palm Beach County, Florida.

G. Any and all rights and all rights and property interests, if any, pursuant to an unrecorded Quit Claim Deed from Donald F. Mintmire, Trustee dated December 23, 1994.

H. Any and all rights, if any, of ADVANTAGE WEST PALM BEACH, to all alleged impact fee waiver as described in Paragraph 7 (B)(7) of Defendants' Answer herein.

By stipulating to this Agreed Order of Taking, Defendant, ADVANTAGE WEST PALM BEACH, specifically does not waive any right to full or just compensation for real property, development rights, contract rights or other rights subject to or impacted by this eminent domain proceeding as may later be determined by the Court or a jury herein with respect to any properties that are or are not included in this eminent domain proceeding but are located within the boundaries of the downtown/uptown development of regional impact. Further, by stipulating to this Agreed Order of Taking, Petitioner does not waive any right to argue or contend that Defendant is not the lawful owner of said rights, that said rights were not validly assigned, that said rights have no value or any other defense that may be asserted by Petitioner to the same. It is the express intention of Petitioner and ADVANTAGE WEST PALM BEACH that upon compliance with the terms of this Order, all ownership, right, title or interest of ADVANTAGE WEST PALM PEACH in real

property or property of any nature, including but not limited to development rights, located within the Downtown/Uptown development of regional impact or otherwise related or pertaining to said development shall vest in Petitioner and Defendant shall in the future assert no claim to the same.

6. That the deposit of money will secure the persons lawfully entitled to the compensation which will be ultimately determined by final judgment of this Court;

7. That the sum of money to be deposited in the Registry of the Court within twenty (20) days of the entry of this Order, shall be in the amount of:

Parcel 701	$ 206,000.00
Parcel 707	91,000.00
Parcel 709	93,000.00
Parcel 6904	82,000.00
Parcel RB 1	480,500.00
Parcel RB 2	338,500.00
Parcel RB 4	144,000.00
Parcel RB 5	291,000.00
Parcel RB 6	185,000.00
TOTAL	$ 1,911,000.00

8. That on deposit as set forth above and without further notice or Order of this Court, the Petitioner shall be entitled to possession of the property as described herein.

9. Petitioner and Defendant, CITY OF WEST PALM BEACH, shall not object to the withdrawal of funds to be deposited in accordance with this Order provided payment is

made of all current and back taxes. Petitioner and Defendant, CITY OF WEST PALM BEACH, waive any rights they may have against ADVANTAGE WEST PALM BEACH regarding Code Enforcement Liens on the property described herein.

DONE AND ORDERED this 6 day of January, 1997, in the State of Florida, County of Palm Beach.

s/ E Fine (copy)
Circuit Judge

APPENDIX F — EXCERPTS FROM ORDINANCE NO. 2268-89 OF THE CITY OF WEST PALM BEACH, FLORIDA DATED MARCH 20, 1989

ORDINANCE NO. 2268-89

AN ORDINANCE OF THE CITY COMMISSION OF THE CITY OF WEST PALM BEACH, FLORIDA, RELATING TO A DEVELOPMENT OF REGIONAL IMPACT KNOWN AS "DOWNTOWN UPTOWN;" MAKING FINDINGS OF FACT AND CONCLUSIONS OF LAW PERTAINING TO DOWNTOWN UPTOWN, ESTABLISHING DEVELOPMENT LIMITATIONS, RESTRICTIONS AND CONDITIONS RELATING TO APPLICATIONS, COMMENCEMENT, AIR, HISTORIC AND ARCHEOLOGICAL SITES, HABITAT, VEGETATION AND WILDLIFE, DRAINAGE, WATER SUPPLY: POTABLE AND NON-POTABLE WATER, HAZARDOUS MATERIALS AND WASTE, WASTEWATER, EDUCATION, POLICE AND PUBLIC SAFETY, FIRE PROTECTION, ENERGY, TRANSPORTATION, HOUSING, CONVERSION OF USES, SITE PLAN REVIEW, LAND USE DISTRIBUTION, DEMOLITION OF EXISTING STRUCTURES, SUBDIVISION OF LAND, RIGHT-OF-WAY ABANDONMENT, LANDSCAPING AND TREE PROTECTION, DESIGN REQUIREMENTS, PARKS AND CAPITAL FACILITIES CONSTITUTING THIS ORDINANCE AS A DEVELOPMENT ORDER BY THE CITY OF WEST PALM BEACH IN COMPLIANCE WITH LAW; PROVIDING AN EFFECTIVE DATE; PROVIDING A TERMINATION DATE; AND FOR OTHER PURPOSES.

* * *

Appendix F

WHEREAS, an Application for Development Approval for the Downtown Uptown Development of Regional Impact, known as "Downtown Uptown," was originally submitted to the City of West Palm Beach and the Treasure Coast Regional Planning Council on March 21, 1988, and was supplemented with additional information submitted August 30, 1988, November 4, 1988 and January 4, 1989, in accordance with Section 389.96, Florida Statues; and

WHEREAS, the applicant, Downtown Uptown Venture, through its authorized agent, James R. Brindell, Esquire, proposes to construct 3.7 million square feet of office space, 190,000 square feet of retail, 800 hotel rooms, and 1,000 dwelling units, constituting a Development of Regional Impact on 76.90 acres of property legally described in Exhibit "A," attached hereto, and located in the City of West Palm Beach, Florida; and

WHEREAS, the DOWNTOWN UPTOWN JOINT VENTURE has filed with the CITY OF WEST PALM BEACH an Application for Development Approval of a Development of Regional Impact under the provisions of Section 380.06, Florida Statutes; and

WHEREAS, the public notice requirements of the City of West Palm Beach and Section 380.07(11), Florida Statutes, have been satisfied and notice has been given to the Florida Department of Community Affairs, Treasure Coast Regional Planning Council, Florida Department of Environmental Regulation, and the South Florida Water Management District; and

Appendix F

WHEREAS, the City and the Treasure Coast Regional Planning Council have considered the application, as submitted and as subsequently supplemented, and found it to be in compliance with applicable law; and

WHEREAS, the City Commission, on March 6, 1989, held a duly noticed public hearing on the Development of Regional Impact Application for Development Approval, and has heard and considered the testimony taken thereat and the reports, recommendations, exhibits, and other documentary evidence submitted at the public hearing; and

WHEREAS, the City Commission has received and considered the report and recommendations of the Treasure Coast Regional Planning Council; and

WHEREAS, the City Commission has made the findings of fact and conclusions of law hereinafter set forth with regard to the Application for Development Approval and has entered the following order; and

WHEREAS, the City, having considered all of the foregoing and being fully advised and informed in the premises, has determined that it is in the best interests of the citizens of West Palm Beach to approve a Development Order for the property which is the subject of the aforementioned Application for Development Approval, subject to specified conditions and limitations.

Now THEREFORE, BE IT ORDAINED BY THE CITY COMMISSION OF THE CITY OF WEST PALM BEACH, FLORIDA, that:

Appendix F

SECTION 1: The City Commission hereby makes the following FINDINGS OF FACT:

1. The DOWNTOWN UPTOWN JOINT VENTURE (the "Developer") has filed with the CITY OF WEST PALM BEACH, FLORIDA (the "City") an Application for Development Approval for a Development of Regional Impact ("Downtown Uptown DRI Application for Development Approval") pursuant to provisions and requirements of Section 380.06, Florida Statutes.

2. Copies of the Downtown Uptown DRI application for development approval were sent to the TREASURE COAST REGIONAL PLANNING COUNCIL ("TCRPC") and the DEPARTMENT OF COMMUNITY AFFAIRS OF THE STATE OF FLORIDA ("DCA") pursuant to Section 380.06(10)(a), Florida Statutes, on July 17, 1987.

3. On April 19, 1988, September 27, 1988 and December 1, 1988, the TCRPC requested additional information in writing from the Developer and additional information was filed on August 30, 1988, November 4, 1988, and January 4, 1989.

4. The Downtown Uptown DRI application for development approval, as supplemented, seeks development approval for approximately 78 acres of real property (hereinafter "Downtown Uptown") which is legally described in Exhibit A, attached hereto and incorporated herein.

5. The City has given notice that a proposed development is undergoing development of regional impact review.

Appendix F

6. The City has given notice and held a public hearing to consider the Downtown Uptown DRI application for development approval in accordance with Section 380.06(11) and the Zoning Code of the City.

7. On February 13, 1989, TCRPC submitted its report and recommendation on the regional impact of the proposed DRI.

8. The proposed development is not in an Area of Critical State Concern, designated pursuant to the provisions of Section 380.06, Florida Statutes.

9. As long as the developer complies with the conditions of approval contained in this Development Order, the development of Downtown Uptown, in accordance with the Downtown Uptown DRI application for development approval, does not unreasonably interfere with the achievement of the objectives of the State Land Development Plan.

10. As long as the developer complies with the conditions of approval contained in this Development Order, the development of Downtown Uptown, in accordance with the Downtown Uptown DRI application for development approval is consistent with the City's comprehensive plan, as amended, and land development regulations proposed to be adopted simultaneously with this Development Order.

11. As long as the developer complies with the conditions of approval contained in this Development Order, the

development of Downtown Uptown, in accordance with the Downtown Uptown DRI application for development approval, is consistent with the report and recommendations of the Treasure Coast Regional Planning Council submitted pursuant to Section 380.07 (12). Florida Statutes, in that:

A. Negative impacts of environmental, natural and historical resources are expected to be minimal and these impacts will be mitigated by compliance with the conditions of approval.

B. The Downtown Uptown development will have a positive impact on the economy of the region.

C. There are adequate public facilities available or planned and funded to serve the development of Downtown Uptown in a safe and efficient manner, provided that such development is carried out in accordance with each and every condition and limitation of this Development Order.

D. Based on the transportation conditions of approval, Phase I of the Downtown Uptown development will efficiently use transportation facilities. Development beyond Phase I is contingent on the transportation and transportation-related impacts being addressed either through the substantial deviation process or as part of the City's Areawide Development of Regional Impact.

E. Based on the housing conditions of approval, the Downtown Uptown development will favorably

affect the ability of people to find adequate housing reasonably accessible to their places of employment.

F. The demand on energy resources has been reduced through the conditions of approval.

SECTION 2: The City Commission hereby makes the following CONCLUSIONS OF LAW:

After having considered the Downtown Uptown DRI application for development approval, the report and recommendations of the TCRPC, the recommendations of the CITY's own professional staff, the opinion, advice and counsel of the public, and based on the above Findings of Fact, the City Commission of the CITY hereby concludes that:

1. As long as the developer complies with the conditions of approval contained in this development order, the development of the Downtown Uptown DRI Application for Development Approval complies with the requirements of Section 380.06(12), Florida Statutes.

2. As long as the developer complies with the conditions of approval contained in this development order, the development of the Downtown Uptown DRI application for development approval complies with the requirements of Section 380.06(14) in that:

   A. The development proposed in the Downtown Uptown DRI application for development

approval will not unreasonably interfere with achievement of the objectives of the State Land Development Comprehensive plan;

B. The development proposed in the Downtown Uptown DRI application for development approval is consistent with the Comprehensive Plan of the City, as amended, and all applicable land development regulations as proposed to be adopted simultaneously with this Development Order; and

C. The development proposed in the Downtown uptown DRI application for development approval is consistent with the report and recommendations of the TCRPC.

3. This Development Order supersedes any and all other Development Orders issued by the City regarding Downtown Uptown pursuant to Section 380.06 or any other Authority.

4. The Downtown Uptown DRI application for development approval and this Development Order has been considered and approved in accordance with each and every applicable requirement of Section 380.06.

SECTION 3: IN ACCORDANCE WITH THE PROVISIONS OF SECTION 380-06, FLORIDA STATUTES (1987). THE CITY COMMISSION OF THE CITY OF WEST PALM BEACH DOES HEREBY GRANT

Appendix F

THIS DEVELOPMENT ORDER APPROVING THE DOWNTOWN UPTOWN DEVELOPMENT OF REGIONAL IMPACT, SUBJECT TO THE CONDITIONS, RESTRICTIONS AND LIMITATIONS HEREINAFTER SET FORTH.

* * *

SITE PLAN REVIEW

41. A. *Intent*

Since the master plan for the project does not contain actual building footprints, the City Planning Board and the City Commission shall retain the ability to review the specific site development proposals for each site. This review will ensure that the development of individual parcels is consistent with the conditions of approval contained in this development order and that the design characteristics of each component have no substantial, adverse effect on surrounding properties. This special process shall be referred to as Level 3 Site Plan Review.

B. *Process*

Site plans for each parcel or portion of a parcel contained within this project shall be submitted to the Administrator of Community Development and Planning prior to the issuance of any building permit. The site plan shall be submitted to the City Planning Board and the City Commission for its review and, unless postponed pending submission of additional information, shall be acted upon

by the City Planning Board within 45 days following the receipt of a completed application and shall be acted on by the City Commission within 60 days after the close of the public hearing conducted by the Planning Board. Failure of the City Commission to review a complete application within this period shall result in automatic approval. Minor changes to be approved site plans shall be approved by the Administrator of Community Development and Planning, or his/her designee. Minor changes are those changes that do not trigger Level I or Level II site plan review pursuant to Section 33.15(e)(5) and (6), West Palm Beach Zoning Code.

C. *Standards*

The Planning Board and City Commission review of individual site plans is limited to the site design qualitative development standards contained in Section 33-15 (c), West Palm Beach Zoning Code, and the conditions of approval contained in this development order. Additionally, the City Commission review shall include the review of any application for a Class A or Class B Special Use and any application for a waiver or reduction of additional standards for a special use or a use permitted with extra requirements submitted with the site plan application. During Level 3 Site Plan Review, the City Commission may exercise its authority to relax or waive zoning code requirements pursuant to Section 33-86, West Palm Beach Zoning Code.

* * *

Appendix F

SECTION 14: This Development Order shall be binding upon and inure to the benefit of the Developer and its assigns or successors in interest and the present owners and their assigns or successors in interest. It is understood that any reference herein to any governmental agency shall be construed to also include any future instrumentality which may be created and designated as successor in interest to, or which otherwise possesses any of the powers and duties or, any referenced governmental agency in existence on the effective date of this Development Order.

SECTION 15: In the event that any portion or section of this Development Order is determined to be invalid, illegal or unconstitutional by a court of competent jurisdiction, such decision shall in no manner affect the remaining portions or section of the Development Order which shall remain in full force and effect.

SECTION 16: This Development Order shall become effective immediately upon second reading.

FIRST READING THIS SIXTH DAY OF MARCH 1989.

SECOND AND FINAL READING THIS TWENTIETH DAY OF MARCH 1989.

Appendix F

(CORPORATE SEAL) CITY OF WEST PALM BEACH
BY ITS CITY COMMISSION

s/ [illegible]
ATTEST: MAYOR

s/ Agnes E. Hayhurst
City Clerk

APPROVED AS TO FORM

s/ Carl V.M. Coffin
City Attorney

March 22, 1989

I hereby certify this to be a true and correct copy of the City of West Palm Beach Ordinance No. 2268-89 as approved by the City Commission March 20, 1989 and consisting of 38 pages.

s/ Agnes E. Hayhurst
City Clerk

APPENDIX G — PETITION IN EMINENT DOMAIN DATED AND FILED JUNE 21, 1996

IN THE CIRCUIT COURT OF THE
15TH JUDICIAL CIRCUIT OF FLORIDA,
IN AND FOR PALM BEACH COUNTY.

CASE NO. CL 96 5381 AI

WEST PALM BEACH COMMUNITY
REDEVELOPMENT AGENCY,

Petitioner,

vs.

ADVANTAGE WEST PALM BEACH, INC., EDWIN J. NELSON, KENNETH S. RAPPAPORT, TRUSTEE, NOVO TRUST, COUNTY OF PALM BEACH, HEARTWOOD 88', INC., DONALD F. MINTMIRE, TRUSTEE, UNITED STATES OF AMERICA, WEST PALM BEACH COMMUNITY REDEVELOPMENT AGENCY, DAVID L. MARSH, FIRST UNION NATIONAL BANK OF FLORIDA, BARTON-ASCHMAN ASSOCIATES, INC., STATE OF FLORIDA DEPARTMENT OF ENVIRONMENTAL REGULATION, SAASTOPANKKIEN KESKUS-OSAKE-PANKKI, WPB GATEWAY DEVELOPMENT COMPANY, RUSSELL BELLE, CITY OF WEST PALM BEACH, S & S INVESTMENTS, (FOR CAMOLEE W. SMELCER), REGINA A. GILLESPIE, BANKATLANTIC, FIRST BANK OF INDIANTOWN, JENNIEVE L. LeBLANC, MORTON F., PHILLIPS, JOYCE PHILLIPS, HELEN M. COBB, OLIVER B. COBB, ARCHY ESAKOVICH, MICHAEL CANTOR, TOLEDANO ITF

Appendix G

RESEARCH TO PREVENT BLINDNESS, P.T.C. FINANCE LIMITED, VERA KAMINESTER, LEWIS KAMINESTER, FRANCIS R. MARADIE, EFFYE E. MARADIE, STELLY-HOVEN, INC., JAMES WATTS, TRUSTEE, MILDRED W. OLSON, RICHARD F. OLSON, ARTHUR WESTCOTT, JOYCE HATCHER, WALTER HATCHER, PAMELA J. ROLFS, FIDELITY FEDERAL SAVINGS BANK OF FLORIDA, RICHARD E. FRIEND, TRUSTEE, A.I.S. PROPERTIES, THE WILLIAM H. CARTWRIGHT FAMILY LIMITED PARTNERSHIP, WILLIAM H. CARTWRIGHT, BERT MOERINGS, MARSHA MOERINGS, JULIA SILVA BALBONI, BANK UNITED FSB, CAROL ANDRUS, MWO VENTURES, INC. and INTERCONTINENTAL BANK, T C ACQUISITION, INC., CHRISTOPHER H. COOK, TRUSTEE, GRACE RIDER, GAYANNE BOOTH, GARRY E. WOOD, ROBERT DOUGLASS, FELIPE PADILLA deALBA, COMMUNITY FEDERAL SAVINGS AND LOAN ASSOCIATION OF THE PALM BEACHES, RUTH DIPIERTRO, STUART LEDIS, BANKERS TRUST COMPANY OF CALIFORNIA, N.A., COUNTY COLLECTION SERVICES, INC., GEORGE A. GRENIER, RAYMOND A. BILLIEL, FIRST FEDERAL SAVINGS & LOAN ASSOCIATION OF THE PALM BEACHES, EMILY M. MOTES, a/k/a EMILY M. HOUSE, WILLIAM KIRSHNER, RUTH D. KIRSHNER, CECEIL TISHMAN, SUNANDA UKHALKAR, SANJEEV UKHALKAR, DAVID BOTTOMS, JR., FEDERAL NATIONAL MORTGAGE ASSOCIATION, HOME FEDERAL SAVINGS & LOAN ASSOCIATION OF PALM BEACH, DAN, INC., LENNAR FLORIDA LAND I.Q.A., LTD., LENNAR FLORIDA PARTNERS I, L.P., U.S. TRUST CO. OF FLORIDA, BANKUNITED FSB,

Appendix G

MAINLINE ENTERPRISES, INC., CHARLES S. ROWAN, JOHN C. CASSIDY, GLOBESPAN TRAVEL INTERNATIONAL, INC., BGS LEASING GROUP, LTD., O.R.E.O., INC., DOUGLAS G. HOWELL, JERRY G. GUFFY, TRUSTEE, PETER GLUCK, ARDEMI, INC., RENE CERISOLES, JUPITER PROPERTIES, INC., GERALD J. SARTORI, ILENE KLASFELD, JON KLASFELD, SERGE HARVEY, JOSEPH M. FALLON, MIRIAM JOANN FELIX, C & H NATIONWIDE, INC., RENE DIBUT, KATHY DIBUT, GEORGE KALEITA, ROSE ANNE KALEITA, ROBERT LEWIS, HELEN LEWIS, JAMES R. KEOGH, DINER'S CLUB, INC., UNITED STATES OF AMERICA, ADMINISTRATOR OF VETERANS AFFAIRS, SCOTT A. JOHNSON, P.A., DAYTON KORT, SUSANNA KORT, ALLAN H. SMITH, JUDITH L. SMITH, AMERICAN EXPRESS COMPANY, KELLY TRACTOR COMPANY, DIXIE CHIROPRACTIC, POLO JEWELERS, ESTATE OF LAKE CLARKE SHORES HOMEOWNERS' ASSOCIATION, STATE OF FLORIDA TAX WARRANT, BEVERLY AND FREEMAN, JONATHAN D. COMMANDER, MUKESH D. BHATT, and JOHN K. CLARK, TAX COLLECTOR,

Respondents.

PETITION IN EMINENT DOMAIN

Petitioner, WEST PALM BEACH COMMUNITY REDEVELOPMENT AGENCY, sues each Respondent set forth in Exhibit "A", attached, and alleges:

Appendix G

1. This is an action in eminent domain to condemn certain property lying, being, located and situated in Palm Beach County, Florida.

2. Petitioner is a community redevelopment agency created pursuant to §163.330, et seq., *Fla. Stat.*

3. Petitioner is exercising its power of eminent domain by virtue of the authority given to it by §163.370 and §163.375, *Fla. Stat.*, and by Chapters 73 and 74, *Fla. Stat.* Said property hereinafter described is necessary for the public purpose of proceeding with the Downtown/Uptown Redevelopment project as described in Petitioner's Redevelopment Plan in order to revitalize and implement the Downtown/Uptown Development of Regional Impact by assembling the remaining parcels within its boundaries and making the same available for redevelopment as a mixed use redevelopment project.

4. A description identifying the property sought to be acquired is attached as Exhibit "A", including any and all rights of development appertaining to said property pursuant to City of West Palm Beach Ordinance No. 2268-89, as amended.

5. The estate or interest sought to be condemned by these proceedings is fee simple absolute title.

6. The ages of each and all natural Respondents named in these proceedings are unknown to the Petitioner.

Appendix G

7. The Petitioner has made a diligent search and inquiry to discover the names, residences, legal disabilities, if any, and the interest in the property of all owners, lessees, mortgagees, junior creditors, lienholders, persons in possession and all persons having or claiming to have any interest in said property, and the same is particularly set forth in Exhibit "A" attached; and to all of the Respondents listed in Exhibit "A" attached if said Respondents are living, if any, and if said Respondents are deceased, the unknown spouse, heirs, devisees, grantees, creditors, lienors, or other parties claiming by, through, under or against any such deceased Respondents, if alive, and if dead, their unknown spouse, heirs, devisees, grantees, creditors, lienors or other parties claiming by, through, under or against any such deceased Respondents; and all parties having or claiming to have any right, title or interest in the property described in these proceedings who are unknown to the Petitioner.

8. Petitioner has surveyed and located its line or area of construction and intends in good faith to construct on or over the described property.

9. The Board of Commissioners of the WEST PALM BEACH COMMUNITY REDEVELOPMENT AGENCY has by Resolution No. 96-7 determined that the acquisition of the property described in attached Exhibit "A" is necessary for the redevelopment project. A copy of Resolution No. 96-7 is attached as Exhibit "B".

10. The City Commission of the City of West Palm Beach has by Resolution No. 151-96 authorized the acquisition of the property described in attached Exhibit "A"

by Petitioner. A copy of City of West Palm Beach Resolution No. 151-96 is attached as Exhibit "C".

11. There are no mobile homes located on the property sought to be acquired.

12. Petitioner has complied with all conditions precedent necessary for the filing of this action.

13. Petitioner reserves the right to set off or claim damages for any and all environmental damages and/or waste associated with any contaminants, including, but not limited to, petroleum products, hazardous waste and medical waste determined to be present on or released into the property sought to be acquired while Respondents were in possession.

WHEREFORE, Petitioner demands that:

A. The property described in this Petition be condemned and taken by Petitioner for the uses and purposes set forth in this Petition and that the interest sought by this Petitioner in said property as set forth in the Petition be vested in the Petitioner.

B. Trial by jury be held on all matters triable as a matter of right by a jury.

C. The jury be required to view the property.

Appendix G

s/ James W. Vance
James W. Vance
VANCE & DONEY, P.A.
Attorneys for Petitioner
1615 Forum Place, Suite 200
West Palm Beach, FL 33401
(561) 684-5544
Florida Bar #083228

–and–

J. Michael Haygood
MACK, WILLIAMS, HAYGOOD
& McLean
980 No. Federal Highway
Suite 305
Boca Raton, FL 33432
(561) 394-4233
Florida Bar #199613
Co-Counsel

APPENDIX H — MOTION IN LIMINE DATED MARCH 26, 1997

IN THE CIRCUIT COURT OF THE
15TH JUDICIAL CIRCUIT OF FLORIDA,
IN AND FOR PALM BEACH COUNTY.

CASE NO. CL 96-5381 AI

WEST PALM BEACH COMMUNITY
REDEVELOPMENT AGENCY,

Petitioner,

vs.

ADVANTAGE WEST PALM BEACH, INC., et al.,

Respondents.

MOTION IN LIMINE

Petitioner, WEST PALM BEACH COMMUNITY REDEVELOPMENT AGENCY, in accordance with §73.061, *Fla. Stat.*, hereby requests that the Court schedule a hearing in limine prior to the valuation trial in this cause and as grounds therefor would show as follows:

1. This is an eminent domain proceeding in which Petitioner is seeking to acquire all, or nearly all, of the lands located within the Downtown Uptown Development of Regional Impact. (Hereinafter "Downtown Uptown DRI").

Appendix H

2. The Downtown Uptown DRI was approved and established by City of West Palm Beach Ordinance No. 2268-89, as subsequently amended by Ordinance No. 2287-89 and Ordinance No. 2313-89. These ordinances collectively comprise the Development Order for the Downtown Uptown DRI. (Hereafter "Development Order"). At the time the Development Order was approved by the City of West Palm Beach, all lands within the boundaries of the DRI were owned or controlled by the applicant/developer, Downtown Uptown Venture, by virtue of one or more land trusts.

3. Subject to certain specified conditions and contingencies, the Development Order approved the construction of a certain level of development within the boundaries of the Downtown Uptown DRI. The DRI Development Order does not specifically detail the type or intensity of development that would ultimately occur or be permitted on any particular parcel of land within the DRI.

4. Since the approval of the Development Order in 1989, numerous mortgage foreclosure sales and tax sales have resulted in the transfer of record title to nearly all lands within the DRI to third parties (other than the Downtown Uptown Venture).

5. Commencing in 1989 and continuing thereafter, the Downtown Uptown Venture executed numerous documents entitled "Collateral Assignment of Development Rights," and therein (through its land trustee) pledged as additional security for certain mortgage loans so-called development rights which were purportedly created by the DRI Development Order. Only some of these Collateral Assignments of Development

Rights were recorded in the public records of Palm Beach County, Florida.

6. The Downtown Uptown Venture subsequently defaulted on a substantial number of the mortgage loans that had been secured by the pledge of certain so-called development rights. Upon judicial sale of some, but not all, of the above-referenced properties, the purchaser purportedly acquired a certain amount of so-called development rights by Certificate of Title. Alternately, some mortgages that had been secured by the pledge of so-called development rights have also been foreclosed upon and no mention of so-called development rights was made in the applicable Certificate of Title following the judicial sale.

7. Moreover, commencing in 1992, the Downtown Uptown Venture (through its land trustee), executed several documents entitled "Absolute Assignment of Development Rights" which purportedly transferred or conveyed all, or nearly all, of the so-called development rights associated with the Downtown Uptown DRI to third parties. As set forth in its Answer filed herein, Defendant, ADVANTAGE WEST PALM BEACH, INC., now claims ownership of substantially all of these so-called development rights and seeks compensation therefore.

8. Numerous issues exist in this cause as to the validity and effect, if any, of the above-referenced purported assignments of development rights. These issues directly and significantly impact the valuation of all lands involved in this eminent domain proceeding. Moreover, prior to the disbursement of any proceeds from the Court Registry and

prior to the valuation trial in this cause, it is necessary for this Court to determine, as a matter of law under all of the facts and circumstances of this cause, the following:

A. Whether the so-called development rights could have been severed from the under-lying real estate within the DRI;

B. Whether developments rights are a species of property which may exist independent of any real property when all of the real property has been transferred to others;

C. Whether the purported assignments of development rights were and continue to be valid; and

D. Whether the parties must value the so-called development rights as severed from the realty and compensate Defendant, ADVANTAGE WEST PALM BEACH, therefore.

9. The Court should hold a hearing, in limine, to settle all disputed issues as to the so-called assignments of development rights prior to trial. A ruling on such issues will greatly simplify valuation issues and apportionment proceedings on all parcels in this cause.

WHEREFORE, Petitioner requests that the Court schedule a hearing, in limine, to settle all disputed matters pertaining to the issue of "development rights" as set forth above.

Appendix H

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by mail to all those listed on the attached mailing this 26th day of March, 1997.

s/ William P. Doney
William P. Doney
VANCE & DONEY, P.A.
Attorneys for Petitioner
1615 Forum Place, Suite 200
West Palm Beach, FL 33401
(561) 684-5544
Florida Bar #083228

–and–

Arnold M. Weiner, Esquire
LAW OFFICES OF ARNOLD M. WEINER
SunTrust Building, Suite 325
1111 Lincoln Road
Miami Beach, FL 33139
(305) 531-9200
Florida Bar #312479

APPENDIX I — COLLATERAL ASSIGNMENT OF DEVELOPMENT RIGHTS DATED FEBRUARY 16, 1990

COLLATERAL ASSIGNMENT OF DEVELOPMENT RIGHTS

THIS COLLATERAL ASSIGNMENT OF DEVELOPMENT RIGHTS, made this 16th day of February, 1990, by and between Mario G. de Mendoza, III, as Trustee, and Downtown/Uptown Venture, hereinafter collectively referred to as "Assignor", and BERT MOERINGS and MARSHA MOERINGS, his wife, as "Assignee"

WITNESSETH:

WHEREAS, Assignor is indebted to the Assignee in the amount of ONE MILLION TWO HUNDRED FIFTY THOUSAND AND NO/100 DOLLARS ($1,250,000.00), which indebtedness is represented by a Promissory Note and Mortgage dated February 15, 1990, which Mortgage encumbers property described as follows:

> Lot Four (4), and the North 1/2 of Lot Five (5), BLOCK 69, HIGHLAND PARK ADDITION TO WEST PALM BEACH, according to the Plat thereof on file in the Office of the Clerk of the Circuit Court in and for Palm Beach County, Florida, recorded in Plat Book 1, Page 122, Public Records of Palm Beach County, Florida.
>
> AND
>
> Lots One (1) through Ten (10), Block SEVEN (7), AMENDED PLAT OF PALM BEACH HEIGHTS,

Appendix I

Addition to West Palm Beach, Florida according to the Plat thereof on file in the Office of the Clerk of the Circuit Court in and for Palm Beach County, Florida, recorded in Plat Book 2, Paged 74, Public Records of Palm Beach County, Florida.

WHEREAS, the City of West Palm Beach, Florida has adopted it's Ordinance No. 2268-89 and 2313-89 (hereinafter referred to as the "Ordinance"), granting Assignor certain development rights with respect to the development known as Downtown/Uptown, within which development the subject property is located; and

WHEREAS, the parties desire that a portion of the development rights held by Assignor be assigned and pledged as security for the aforementioned indebtedness;

NOW, THEREFORE, in consideration of the premises, and for value received at or before the ensealing and delivery of these presents, the Assignor does hereby conditionally transfer, sell, set over, convey and assign unto Assignee the right to utilize 125,000 square feet of the office or retail development approved for the subject real property by and subject to all of the terms and conditions set forth in City of West Palm Beach Ordinance No. 2268-89 and 2313-89, as and for security for the repayment of Assignor's indebtedness to Assignee.

TO HAVE AND TO HOLD the same from the date hereof during the term of said Promissory Note and any extension or renewal thereof, subject to the following conditions:

Appendix I

1. In the event of any default on the part of the Assignor under the Note and Mortgage in favor of Assignee which is not cured within ten (10) days, Assignee may declare the remaining balance of the note to be due and payable, and at the sole option of Assignee, this Assignment shall effectuate and Assignee shall have all rights available to a secured creditor under the provisions of Chapter 679, Florida Statutes.

2. Assignee shall not be under any obligation at any time to perform any of the obligations and duties of the Assignor under the Ordinance. However, upon the exercise of the Assignee's rights under this Collateral Assignment of Development Rights, the Assignee and any other purchaser of Assignor's rights shall be bound by all of the terms, conditions and provisions of the Ordinance.

THIS COLLATERAL ASSIGNMENT OF DEVELOPMENT RIGHTS shall remain in full force and effect until payment in full of the Assignor's obligation to Assignee, including any extension or renewal thereof, at which time all obligations hereunder shall terminate.

IN WITNESS WHEREOF, the parties have caused these presents to be executed on the day and year first above written, by their undersigned officers thereunto duly authorized.

Appendix 1

Signed, sealed and delivered
in the presence of:

s/ Audrey Blair
Witness

s/ [illegible]
Witness

s/ Mario G. de Mendoza, III
Mario G. de Mendoza, III
as Trustee

DOWNTOWN/UPTOWN
VENTURE
a Florida General Partnership

s/ [illegible]
Witness

s/ [illegible]
Witness

By: s/ David C. Paladino II
David C. Paladino II,
Partner

Appendix I

STATE OF FLORIDA)
)
COUNTY OF PALM BEACH)

I HEREBY CERTIFY that on this day before me, an officer duly qualified to take acknowledgments, personally appeared MARIO G. de MENDOZA, III, as Trustee, to me known to be the person described in and who executed the foregoing instrument and acknowledged before me that he executed the same.

WITNESS my hand and official seal in the County and State last aforesaid this 16th day of February, 1990.

s/ Audrey Blair
Notary Public

My commission expires:
3/28/92

APPENDIX J — EXCERPTS FROM AGREEMENT FOR THE PURCHASE AND SALE OF REAL PROPERTY DATED JUNE 28, 1991

AGREEMENT FOR THE PURCHASE AND SALE OF REAL PROPERTY

Between

DONALD F. MINTMIRE, as Trustee and not individually, as "Seller"

and

CITY OF WEST PALM BEACH, a municipal corporation of the State of Florida, as "Buyer"

for

a vacant parcel of land

in

Palm Beach County, Florida

Attorneys for Buyer:

Carl V. M. Coffin, Esq.
City of West Palm Beach
200 2nd Street
West Palm Beach, FL 33401
Telephone: (407) 659-8017
Fax: (407) 659-8039

Attorneys for Seller:

Marvin S. Rosen, Esq.
Honigman Miller Schwartz and Cohn
222 Lakeview Avenue,
Suite 800
West Palm Beach, FL 33401
Telephone: (407) 838-4500
Fax: (407) 832-3036

Appendix J

AGREEMENT FOR THE PURCHASE AND SALE OF REAL PROPERTY

THIS AGREEMENT FOR THE PURCHASE AND SALE OF REAL PROPERTY ("**Agreement**") is made this 28th day of June, 1991, by and between Donald F. Mintmire, as Trustee and not individually, under Trust Agreement dated April 27, 1987, as amended, whose address is c/o Alagia, Day & Marshall, 265 Sunrise Avenue, Palm Beach, Florida 33480, (hereinafter referred to as "Seller"), and The City of West Palm Beach, a municipal corporation of the State of Florida, whose address is 200 2nd Street, West Palm Beach, Florida 33401 (hereinafter referred to as "**Buyer**").

RECITALS:

A. Seller is the owner of certain real property located in Palm Beach County, Florida, more particularly described in *Exhibit "A"* attached hereto (hereinafter referred to as the "**Property**").

B. Seller desires to sell the Property to Buyer, and Buyer desires to purchase the Property from Seller, pursuant to the terms and conditions of this Agreement.

NOW, THEREFORE, for and in consideration of the sum of TEN AND NO/100 ($10.00) DOLLARS and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged by Seller, it is hereby agreed as follows:

Appendix J

ARTICLE I

SALE – PURCHASE

Section 1.01 ***Property.*** Seller agrees to sell and Buyer agrees to purchase the Property, including all rights-of-way, privileges and easements appurtenant to the Property.

Section 1.02 ***Project.*** Buyer intends to purchase the Property for purposes of constructing a roadway in accordance with the proposal commonly known as "Plan A" contained within the governing Development Order, Ordinance No. 2268-89, as amended by Ordinance No. 2287-89 and by Ordinance No. 2313-89 (the "Development Order").

Section 1.03 ***Time for Acceptance and Effective Date.*** If this Agreement is not executed by both Buyer and Seller and delivered to Buyer by 5:00 P.M. on June 28, 1991, this Agreement shall thereafter be null and void. The "Effective Date" of this Agreement shall be the date on which the last one of the Seller or Buyer has executed this Agreement. The "Closing" shall be the event which transpires on the "Closing Date" (as defined in Section 6.01 of this Agreement). The "Breaking of Escrow" (as defined in Section 6.02 hereof) shall be the time at which all terms of this Agreement are considered fully performed, unless specifically provided to survive the Closing hereof. The use of the terms "Closing" and "Closing Date" when used in this Agreement can be used interchangeably.

Section 1.04 ***Compliance With Florida Statutes §166.045.*** The parties recognize that the requirements of Florida Statutes §166.045 apply to this transaction.

Appendix J

ARTICLE II

PURCHASE PRICE AND TERMS OF PAYMENT

Section 2.01 ***Purchase Price.*** The purchase price for the Property is TWO MILLION FIVE HUNDRED THOUSAND AND NO/100 ($2.500,000.00) DOLLARS (hereinafter called the "Purchase Price") payable in accordance with the following Section 2.02 hereof.

* * *

IN WITNESS WHEREOF, each of the parties hereto have duly executed this agreement as of the date indicated below.

WITNESSES:	SELLER:
s/ Lynda L. Brodsky	s/ Donald F. Mintmire, Trustee
s/ [illegible]	Donald F. Mintmire, as Trustee (and not individually) under Land Trust Agreement dated April 27, 1987, as amended

Dated: June 27, 1991

Appendix J

BUYER:

CITY OF WEST PALM BEACH, a municipal corporation of the State of Florida

Attest:

s/ Agnes E. Hayhurst
Agnes Hayhurst,
City Clerk

By: s/ David L. Smith
David L. Smith, Vice Mayor

Dated: June 28, 1991

APPENDIX K — ABSOLUTE ASSIGNMENT OF DEVELOPMENT RIGHTS DATED DECEMBER 30, 1992

ABSOLUTE ASSIGNMENT OF DEVELOPMENT RIGHTS

THIS ABSOLUTE ASSIGNMENT OF DEVELOPMENT RIGHTS, made this 30th day of December, 1992, by and between DONALD F. MINTMIRE, as TRUSTEE, and DOWNTOWN/UPTOWN VENTURE, hereinafter collectively referred to as "ASSIGNOR", and BERT MOERINGS and MARSHA MOERINGS, his wife, hereinafter collectively referred to as "ASSIGNEE".

WITNESSETH:

WHEREAS, ASSIGNOR is indebted to ASSIGNEE and ASSIGNEE has agreed to forbear from moving for or otherwise seeking a deficiency judgment against ASSIGNOR until after December 31, 1993; and

WHEREAS, ASSIGNOR has conveyed to ASSIGNEE, and ASSIGNEE owns or holds an interest in and to the property described as follows:

> Lots 1 through 10, Block 7, Palm Beach Heights Addition, Plat Book 2, page 74. Palm Beach County Public Records.

WHEREAS, the City of West Palm Beach, Florida has adopted its Ordinance No: 2268-89 and 2313-89 (hereinafter referred to as the "ORDINANCE"), granting ASSIGNOR certain development rights with respect to the development known as DOWNTOWN/UPTOWN, within which development the subject property is located; and

Appendix K

WHEREAS, the parties desire that a portion of the development rights held by ASSIGNOR be assigned and transferred as consideration for the forbearance of ASSIGNEE;

NOW, THEREFORE, in consideration of the premises, and in consideration of the forbearance of ASSIGNEE as outlined herein, and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the ASSIGNOR does hereby unconditionally transfer, sell, set over, convey and assign unto ASSIGNEE the right to utilize 370,000 square feet of the office or retail development approved for the subject real property by and subject to all of the terms and conditions set forth in City of West Palm Beach Ordinance No: 2268-89 and 2313-89, as and for consideration as set forth herein.

TO HAVE AND TO HOLD the same from the date hereof subject to the condition that ASSIGNEE shall not be under any obligation at any time to perform any of the obligations and duties of the ASSIGNOR under the ORDINANCE; however, upon the exercise of the ASSIGNEE'S rights under this Absolute Assignment of Development Rights, the ASSIGNEE and any other purchaser of ASSIGNOR'S rights shall be bound by all of the terms, conditions and provisions of the ORDINANCE.

IN WITNESS WHEREOF, the parties have caused these presents to be executed on the day and year first above written, by their undersigned officers thereunto duly authorized.

Appendix K

Signed, sealed and delivered
in the presence of:

s/ Dawn S. Salamone
Witness Dawn S. Salamone

s/ Lynda L. Brodsky
Witness Lynda L. Brodsky

s/ Donald F. Mintmire
DONALD F. MINTMIRE,
as TRUSTEE

DOWNTOWN/UPTOWN
VENTURE
a Florida General Partnership

s/ [illegible]
Witness

s/ Victoria Paladino
Witness

By: s/ David C. Paladino, II
DAVID C. PALADINO, II
PARTNER

Appendix K

STATE OF FLORIDA)
)
COUNTY OF PALM BEACH)

I HEREBY CERTIFY that on this day before me, an officer duly qualified to take acknowledgments, personally appeared DONALD F. MINTMIRE, as Trustee, to me known to be the person described in and who executed the foregoing instrument and acknowledged before me that he executed the same.

WITNESS my hand and official seal in the County and State last aforesaid this 30th day of December, 1992.

s/ Lynda L. Brodsky
Notary Public

My Commission Expires: 6/24/94

[stamp]
LYNDA L. BRODSKY
MY COMMISSION # CC 813987
EXPIRES: June 24, 1994

APPENDIX L — ABSOLUTE ASSIGNMENT OF DEVELOPMENT RIGHTS DATED APRIL 15, 1994

ABSOLUTE ASSIGNMENT OF DEVELOPMENT RIGHTS

THIS ABSOLUTE ASSIGNMENT OF DEVELOPMENT RIGHTS, made this 15 day of April, 1994, by and between PAMELA J. ROLFS, hereinafter referred to as "ASSIGNOR", and BERT MOERINGS and MARSHA MOERINGS, his wife, hereinafter referred to as "ASSIGNEE".

WITNESSETH:

WHEREAS, ASSIGNOR desires to transfer to ASSIGNEE and ASSIGNEE seeks assignment of certain development rights previously transferred to ASSIGNOR by Downtown/Uptown Venture and Donald F. Mintmire, as Trustee, by Absolute Assignment of Development Rights dated December 30, 1992, a copy attached hereto; and

WHEREAS, ASSIGNEE owns or holds a legal or equitable interest in and to property that will benefit from said assignment; and

WHEREAS, the City of West Palm Beach, Florida has adopted its Ordinance No: 2268-89 and 2313-89 (hereinafter referred to as the "ORDINANCE"), granting ASSIGNOR certain development rights with respect to the development known as DOWNTOWN/UPTOWN, within which development the subject property is located; and

Appendix L

WHEREAS, the parties desire that a portion of the development rights held by ASSIGNOR be assigned and transferred;

NOW, THEREFORE, in consideration of the premises, including the sum of $10.00 cash in hand paid and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the ASSIGNOR does hereby unconditionally transfer, sell, set over, convey and assign unto ASSIGNEE the right to utilize 55,000 square feet of the office, 96,255 retail development, 400 hotel rooms, 425 residential rooms, by and subject to all of the terms and conditions set forth in City of West Palm Beach Ordinance No: 2268-89 and 2313-89, as and for consideration as set forth herein.

TO HAVE AND TO HOLD the same from the date hereof subject to the condition that ASSIGNEE shall not be under any obligation at any time to perform any of the obligations and duties of the ASSIGNOR (or his predecessor in interest) under the ORDINANCE; however, upon the exercise of the ASSIGNEE'S rights under this Absolute Assignment of Development Rights, the ASSIGNEE and any other purchaser of ASSIGNOR'S rights shall be bound by all of the terms, conditions and provisions of the ORDINANCE.

IN WITNESS WHEREOF, the parties have caused these presents to be executed on the day and year first above written, by their undersigned officers thereunto duly authorized.

Appendix L

Signed, sealed and delivered
in the presence of:

s/ Donald F. Mintmire
Witness Donald F. Mintmire

s/ Pamela J. Rolfs
PAMELA J. ROLFS

s/ Henry J. Rolfs, Jr.
Witness HENRY J. ROLFS, JR.

STATE OF FLORIDA)
)
COUNTY OF PALM BEACH)

I HEREBY CERTIFY that on this day before me, an officer duly qualified to take acknowledgments, personally appeared PAMELA J. ROLFS, to me known to be the person described in and who executed the foregoing instrument and acknowledged before me that she executed the same.

WITNESS my hand and official seal in the County and State last aforesaid this 15 day of April, 1994.

s/ Paul A. Gafran
Notary Public

My Commission Expires:

[stamp]
OFFICIAL NOTARY SEAL
PAUL GAFRAN
COMMISSION NUMBER
CC267765
MY COMMISSION EXP.
APR. 5, 1997

APPENDIX M — SETTLEMENT AGREEMENTS DATED NOVEMBER 1994 AND NOVEMBER 18, 1994

TERMS OF SETTLEMENT

Advantage West Palm Beach, Inc. ("AWPB") and all the persons listed below, in their capacities as beneficiaries under that Trust dated April 27, 1987 (the "April 27, 1987 Trust") (as amended and under which Donald F. Mintmire serves as Trustee) and in every other capacity whatsoever, whether individual, corporate, representative or otherwise (collectively, the "Signers"), hereby agree as follows:

1. AWPB agrees to pay Signers $600,000.00 at closing.

2. AWPB agrees to hold first-phase development rights as a separate asset from all real property holdings and further agrees to value the development rights at no less than Eight Hundred Forty-Five Thousand Dollars and No/100 ($845,000.00). $750,000.00 of the proceeds of the sale of development rights shall go to the Signers.

3. The Signers agree to convey by quit-claim deed or by other appropriate method as determined by AWPB, all lands and legal and equitable rights and interests owned or controlled within the Downtown/Uptown DRI to AWPB.

4. The Signers represent that they comprise all the beneficiaries of the April 27, 1987 Trust. The Signer will instruct the Trustee to execute all documents necessary to effectuate this settlement.

Appendix M

Executed this __ day of November 1994.

ADVANTAGE WEST PALM BEACH, INC.

By: s/ Bert J. Moerings
Bert Moerings, President

SIGNERS

s/ Zoe D. Rolfs
Mrs. Zoe D. Rolfs

s/ Henry J. Rolfs
Henry J. Rolfs

s/ David C. Paladino
David C. Paladino

Appendix M

TERMS OF SETTLEMENT WITH CITY OF WEST PALM BEACH

The undersigned hereby agree to the settlement of the pending eminent domain proceeding styled *City of West Palm Beach v. Donald F. Mintmire, Trustee,* involving the Okeechobee Boulevard right-of-way within the Downtown/ Uptown development of regional impact upon the following terms and conditions:

1. In consideration for the full and complete settlement of the above styled eminent domain proceedings, including the pending appeal to the Fourth District Court of Appeal in Case No. 93-1352, and further including all costs and attorney's fees therein, both at trial and on appeal, City agrees to release the undersigned trustee and beneficiaries of the Mintmire trust from any and all claims including reimbursement or payment for the following expenses incurred by City in conjunction with the acquisition and construction of the Okeechobee Boulevard right-of-way:

A) Relocation of AT&T Cable	$125,000.00
B) Expenses incurred pertaining to detour	$100,000.00
C) Purchase of Barton-Aschmann 30% construction plans	$460,000.00
Total	$685,000.00

Appendix M

The undersigned trustee and beneficiaries of the Mintmire trust agree to dismiss the pending appeal with the Fourth District Court of Appeal with prejudice and deliver general releases in favor of the City of West Palm Beach, its officers, agents, attorneys, employees and other officials as to any and all claims of those with a legal or beneficial interest in the Downtown/Uptown development of regional impact, the eminent domain proceedings or other claims against the City.

2. The above release by City is intended to apply solely to the benefit of the undersigned trustee and beneficiaries of the Mintmire trust and is not intended to and shall not be construed to release the developer of the Downtown/Uptown DRI, or its successors or assigns, from any duties or obligations imposed by the development order, as amended.

3. The undersigned trustee and beneficiaries of the Mintmire trust hereby reaffirm the assignment of the "Mintmire Agreement" as shown in that document dated April 15, 1994 and recorded in Official Record Book 8221, page 209 of the Public Records of Palm Beach County. Said agreement has subsequently been assigned to Advantage West Palm Beach, Inc. City shall pay the sum of $600,000.00 to Advantage West Palm Beach, Inc. upon dismissal of the pending eminent domain appeal, and thereafter, City,

upon receipt of the subject property from the State of Florida Department of Transportation, will convey by Quit Claim Deed the excess Okeechobee Boulevard right-of-way to Advantage West Palm Beach, Inc. Upon doing so, the "Mintmire Agreement" shall be deemed fully executed and shall be terminated and each party shall release the other from the terms thereof. Advantage West Palm Beach, Inc. shall indemnify, defend and hold the City harmless from any and all claims from third parties as a result of the City's conveyance of the excess Okeechobee Boulevard right-of-way to Advantage West Palm Beach, Inc.

4. City shall use its best efforts to support the waiver of road impact fees for the Downtown/Uptown DRI. City shall also acknowledge the vesting of the Phase I development rights under the DRI and will use its best efforts to reactivate the community development district.

5. The undersigned trustee and beneficiaries of the Mintmire trust agree to instruct their attorney in the eminent domain appeal proceeding to execute a joint motion requesting that the appellate court defer ruling on the appeal for a period of thirty (30) days to permit finalization of settlement of this matter.

6. City shall erect a statue in honor of Henry Rolfs, Sr. within the Downtown/Uptown project Okeechobee Boulevard median.

Appendix M

7. The undersigned trustee and beneficiaries of the Mintmire trust represent that they compromise all beneficiaries of that trust agreement dated April 27, 1987, as amended, under which Donald F. Mintmire serves as trustee. The undersigned beneficiaries of the Mintmire trust will instruct the trustee to execute all documents necessary to effectuate the terms of this settlement.

8. The parties hereto understand and acknowledge that this Agreement constitutes an offer to settle or comprise disputed claims and that this document, as well as any relevant conduct or statements made in negotiations concerning this document, shall be inadmissible in any future legal proceedings in accordance with Section 90.408, *Fla. Stat.*

Executed this 18 day of November, 1994.

Advantage West Palm Beach, Inc.

By s/ Bert J. Moerings

Beneficiaries of the Mintmire Trust

s/ Zoe D. Rolfs
Mrs. Zoe D. Rolfs

s/ Henry J. Rolfs, Jr.
Henry J. Rolfs, Jr.

Appendix M

s/ David C. Paladino
David C. Paladino

s/ Donald F. Mintmire, Trustee
Donald F. Mintmire, Trustee

The above terms are acceptable
in concept subject to approval
the City Commission

s/ Nancy Graham
Mayor

APPENDIX N — LETTERS OF ADVANTAGE WEST PALM BEACH, INC. AND FIRST UNION NATIONAL BANK OF FLORIDA DATED DECEMBER 15, 1994

ADVANTAGE WEST PALM BEACH, INC.

Bert Moerings
President

1001 Alternate A1A
Jupiter, FL 33477
(407) 747-1659
FAX (407) 746-1055

December 15, 1994

Nancy I. O'Brien
Senior Vice-President
FIRST UNION NATIONAL BANK OF FLORIDA
4299 NE 36th Street
Miami Springs, FL 33166

Dear Ms. O'Brien:

The purpose of our December 2nd, 1994 meeting was not to settle your judgment. It was to facilitate a settlement while not being a party to it. Our offer was made to enhance the value of your property from our Development Rights. Our additional offers to have an option on your property through March, 1995 at $650,000, and later at $750,000, seem to be fruitless. You may, of course, reject them as you see fit.

I did indicate to Jim Vance that I would be willing to consider providing First Union with 50,000 sq.ft. of development rights not tied to an option on the property. I remain willing to do that with the only condition being that I am able to close the settlement agreement with the city.

Appendix N

I obviously do not agree with the conclusions of your consultant Mr. Kilday, and believe that the city will bear me out on this. Their formal response should be forthcoming.

Mr. Kushner was correct, that I am unwilling to offer consideration beyond that which is outlined herein. Please keep in mind that I have effectively increased my offer twice without receiving any constructive suggestions from the bank.

My goal is to bring benefit to us all by moving the project forward, rather than relying on the scant possibility of receiving a cash judgment from the courts three to five years from now. At present, my position is the same as yours. I am not the debtor to First Union Bank. Moving the project forward offers a far greater opportunity to recapture the bulk of our investments. We would like to be viewed as part of the solution and not part of the problem.

I am open to any constructive discussion and look forward to meeting with you in the next day or two.

Sincerely,

s/ Bert J. Moerings
Bert Moerings
President

Appendix N

4299 Northwest 36th Street
Miami Springs, Florida 33166
305 883 4402

December 15, 1994

VIA TELECOPIER AND REGULAR MAIL

Mr. Bert Moerings
c/o Mr. Hank Gonzalez
Gonzalez & Associates
1001 Alternate A1A
Jupiter, FL 33477

Re: *Downtown/Uptown Development*

Dear Mr. Moerings:

This letter is in response to certain telephone conversations that occurred yesterday between First Union's counsel, Manny Kushner, and you and your representative, Hank Gonzalez. More particularly, Mr. Kushner advises us that you are uncomfortable attending a meeting without my attendance or the attendance of some other "decision maker" from the Bank; that you are not willing to provide any additional consideration over and above what you have already offered to First Union; and that you believe upon assignment of your development rights to the Bank, or its successors, the Bank will become entitled to immediately obtain building permits and commence construction. This letter responds to each of these items.

Appendix N

I had not planned on attending the meeting proposed for this afternoon, because I did not think my attendance was necessary. Irene Marshall and Raul Martinez are familiar with the issues and have the necessary authority to resolve this matter. If you would like me to attend a meeting with you and your counsel, however, I will be happy to attend at a mutually agreeable place and time. First Union is anxious to amicably and reasonably resolve this matter, and I offer my personal involvement, if you believe it would help to achieve that goal.

Although I understand you are unwilling to offer anything more than you have already offered to First Union, I am unsure as to what offer is currently on the table, given that First Union has never received a written proposal from you as was requested on December 2, 1994. My understanding is that you initially offered an assignment of 50,000 square feet of development rights and an option to purchase First Union's property for $650,000 cash, with closing to occur sometime in March, 1995. Thereafter, you revised the offer to include an assignment of development rights, with an option to purchase First Union's property at $750,000.00, contingent upon some form of First Union financing. Neither offer required you to provide First Union with any deposit monies. Thereafter, First Union received an informal, indirect communication that you would be willing to offer development rights for First Union's property in the Downtown/Uptown development, independent of any agreement to purchase that property. During the December 2nd meeting, you had suggested the value of the Bank's property including development rights to be in the range of $14 per square foot — or in excess of $900,000. Such value

would be, in your opinion, approximately $4 per square foot higher than the current value which excludes development rights.

As you may be aware, First Union has an outstanding "as is, where is" cash offer on the subject property in the Downtown/ Uptown development, for an amount in excess of $650,000.00. You may also be aware that First Union is the holder of a Final Judgment in the amount of $750,000.00, which provides that it has a first lien on any proceeds that may be recovered in the condemnation litigation. Although there are issues that would need to be resolved favorably to the Bank before it could collect on that Final Judgment, First Union believes that its Final Judgment has value, and that it owes a duty to its depositors and shareholders to attempt to obtain a fair price for that Judgment and/or its real property. It is First Union's belief that your offers fall below what First Union would be willing to accept to resolve this matter. Accordingly, First Union is relying upon you to tell us whether you wish to negotiate any further, notwithstanding your comment that you are unwilling to offer anything further to the Bank.

Finally, immediately after the City Commission meeting on December 5, 1994 First Union hired, at its expense, an independent land planner, Kilday & Associates, to advise First Union as to the status of the Downtown/Uptown development, and the value of the development rights that you have offered to the Bank. First Union's consultants reviewed the DRI, interviewed officials from the City of West Palm Beach, and issued a written report to the Bank. Contrary to your comment to Manny Kushner yesterday that a permit could be obtained

immediately upon receipt of your development rights, our consultants have suggested that your developments rights may be worthless, and that even with the development rights, it is likely that no permits will be issued until the outstanding conditions of approval (which are estimated to involve the expenditure of several million dollars), have been complied with. Accordingly, enclosed is a copy of a letter that I have sent on this date to Michael Wright, City Administrator, to clarify the City's position as to your development rights and the utility of those rights. Mr. Wright's name was provided to Manny Kushner by Mr. Gonzalez as someone from the City of West Palm Beach who could verify your statement that upon receipt of your development rights, there would be no further impediment to immediate construction. Obviously, this point needs to be clarified immediately.

Given the foregoing outstanding issues, as well as the reported negative tenor of your remarks to Mr. Kushner yesterday, it seems it might be counterproductive for the meeting to occur today. Rather, it might be more appropriate to postpone the meeting for a day or so in order to better evaluate these issues, including First Union's receipt of Mr. Wright's response to the enclosed letter. If you decide that your wish to negotiate further with First Union, I will make myself available, however, I suggest that you have your legal counsel also present at such a meeting so that if a settlement is achieved, we can begin the process of drafting appropriate closing documentation.

Appendix N

I look forward to your written response to this letter.

Sincerely,

FIRST UNION NATIONAL BANK OF FLORIDA

s/ Nancy I. O'Brien
Nancy I. O'Brien
Senior Vice President

Enclosure

APPENDIX O — LETTER OF THE CITY OF WEST PALM BEACH DATED DECEMBER 15, 1994

The City of
West Palm Beach
"The Orchid City"

CITY ADMINISTRATOR'S OFFICE
P.O. Box 3366
West Palm Beach, Florida 33402
Tel: 407/659-8024
Fax: 407/659-8066

VIA TELECOPIER AND REGULAR MAIL

December 15, 1994

Nancy I. O'Brien
Senior Vice President
First Union National Bank of Florida
4299 N.W. 36th Street
Miami Springs, FL 33166

Re: Downtown/Uptown Development
First Union Site Located at
Okeechobee Blvd. and Dixie Highway

Dear Ms. O'Brien:

I am in receipt of your letter dated December 14, 1994 in which you request certain assurances regarding First Union's right to undertake a development on its property (the "Development") pursuant to the Downtown/Uptown DRI, as amended (the "DRI"). The City of West Palm Beach hereby provides you with the following assurances:

(1) Although there are numerous conditions that must be fulfilled prior to development beyond

Appendix O

Phase IA of the DRI and further conditions to be fulfilled prior to development beyond Phase I, there is 500,000 square feet of office space (or the equivalent trip generation of retail space) available under Phase IA without further condition, except as set forth below.

(2) Of the 500,000 square feet of office space available under Phase IA, 390,000 square feet of office space (or equivalent) has been potentially used for the Festival Marketplace Project under Resolution No. 168-91 (which may be subject to abandonment at this time for failure to meet conditions required thereunder) leaving a net of 110,000 square feet of office space (or equivalent) available under Phase IA of the DRI.

(3) First Union would have to undertake its Development as a part of Phase IA to develop without further conditions.

(4) The development application must be processed and approved as a Level Three Site Plan Review pursuant to sections 41 and 43 of the DRI and must meet the applicable land use conditions under the DRI. In addition, such governmental impact fees and/or fair share road impact fees as are applicable at the time of application for building permit must be paid.

(5) The development rights under the DRI have purportedly been severed from the ownership of

the underlying real estate, and we are advised that Advantage West Palm Beach, Inc. (whose principal is Bert Moerings) either owns or controls the Phase I development rights. In the absence of a judicial determination on the question, the City is unable to express an opinion on the validity of an assignment of development rights separate from the underlying real estate.

(6) However, any application which has the development rights attached to the real estate will be processed as described above. In those cases where the City receives an application for development from an owner within the DRI with no development rights attached, the City will likely require a judicial determination as to its duty to grant a permit. Therefore, if a portion of the development rights owned by Advantage West Palm Beach, Inc. is attached to the land owned by First Union, the City will process the application, subject to the other conditions stated herein.

(7) Please note that after December 1, 1995, a traffic study will be required prior to issuance of a building permit (See Sec. 6 of Ordinance No. 2287-89).

We trust that this provides you with the needed assurances. Please advise if you need anything further.

Appendix O

The City looks forward to a project on your site in the near future.

Sincerely,

s/ Michael J. Wright
Michael J. Wright
City Administrator

cc: Mayor Nancy Graham
Patrick N. Brown, City Attorney
Rick Greene, Planning Director
Bert Moerings

APPENDIX P — ABSOLUTE ASSIGNMENT OF DEVELOPMENT RIGHTS DATED DECEMBER 22, 1994

THIS ABSOLUTE ASSIGNMENT OF DEVELOPMENT RIGHTS, made this 22 day of December, 1994, by Ben Moerings and Marsha Moerings, his wife, and Advantage West Palm Beach, Inc. (collectively "Assignor") to O.R.E.O., Inc., a Florida corporation ("Assignee")

WITNESSETH:

WHEREAS, the City of West Palm Beach, Florida has adopted Ordinance No. 2268-89 and 2313-89 (the "Ordinance") for the development of regional impact known as Downtown/Uptown (the "D.R.I."); and

WHEREAS, Assignor claims ownership of certain development rights for real property within the D.R.I.; and

WHEREAS, Assignee owns fee title to the real property within the D.R.I. more particularly described in Exhibit "A" attached hereto; and

WHEREAS, the parties desire that a portion of the development rights held by Assignor be assigned and transferred to Assignee;

NOW, THEREFORE, in consideration of the sum of Ten Dollars ($10.00) and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, Assignor does hereby unconditionally and absolutely transfer, sell, set over, convey and assign to Assignee the exclusive right to utilize up to fifty thousand (50,000) square feet of retail space, or its equivalent in trip generation for office or

any other permitted uses, in connection with real property now or hereafter a part of the D.R.I. It is the intent of the parties that this assignment have the effect of reserving for the exclusive use of Assignee, its successors and assigns, the development rights for the density described herein, including but not limited to all such rights remaining for Phase 1A of the D.R.I. as set forth in the Ordinance.

Nothing in this Assignment shall be construed as requiring Assignee to assume any obligations or liabilities, including without limitation any obligations of Developer under the Ordinance.

Assignor represents and warrants to Assignee that Assignor has all necessary and proper legal authority to make this Assignment and that none of the development rights assigned hereby have been or will be assigned to any third party.

All of the development rights assigned hereby shall be freely transferable and assignable by Assignee, in whole or in part, to the owner of any real property within the D.R.I. or concurrently with the sale by Assignee of any real property within the D.R.I.

IN WITNESS WHEREOF, Assignor has caused these presents to be executed the day and year first above written.

Appendix P

ASSIGNOR:

s/ William P. Doney
s/ James W. Vance

s/ Bert J. Moerings
Bert Moerings

s/ William P. Doney
s/ James W. Vance

s/ Marsha Moerings
Marsha Moerings

Advantage West Palm Beach, Inc.

s/ William P. Doney
s/ James W. Vance

By s/ Bert J. Moerings

STATE OF FLORIDA)
)SS
COUNTY OF PALM BEACH)

The foregoing instrument was acknowledged before me this 23 day of December, 1994, by Bert Moerings who is personally known to me or produced Driver's License as identification.

s/ Hazeline F. Carson
Print Name: Hazeline F. Carson
Notary Public
My Commission Expires:

[stamp]
Hazeline F. Carson
Notary Public, State of Florida
Commission No. CC 344319
My Commission Expires
01/26/98
Bonded through Fla. Notary
Service & Bonding Co.

Appendix P

STATE OF FLORIDA)
)SS
COUNTY OF PALM BEACH)

The foregoing instrument was acknowledged before me this 23rd day of December, 1994, by Marsha Moerings who is personally known to me or produced Driver's License as identification.

s/ Kristie L. Keller
Print Name:
Notary Public
My Commission Expires:

[stamp]
KRISTIE L. KELLER
MY COMMISSION
#CC366825
EXPIRES May 7, 1998
BONDED THRU TROY
FARM INSURANCE, INC.

Appendix P

STATE OF FLORIDA)
)SS
COUNTY OF PALM BEACH)

The foregoing instrument was acknowledged before me this 23rd day of December, 1994, by Bert Moerings as President of Advantage West Palm Beach, Inc., on behalf of the corporation. He/She is personally known to me or produced driver's license as identification.

s/ Hazeline F. Carson
Print Name: Hazeline F. Carson
Notary Public
My Commission Expires:

[stamp]
Hazeline F. Carson
Notary Public, State of Florida
Commission No. CC 344319
My Commission Expires
01/26/98
Bonded through Fla. Notary
Service & Bonding Co.

APPENDIX Q — EXCERPT OF RESOLUTION NO. 136-95 OF THE CITY OF WEST PALM BEACH, FLORIDA

RESOLUTION NO. 136-95

A RESOLUTION OF THE CITY COMMISSION OF THE CITY OF WEST PALM BEACH, FLORIDA, RELATING TO A DEVELOPMENT OF REGIONAL IMPACT KNOWN AS "DOWNTOWN UPTOWN" AND TO ORDINANCE NO. 2268-89 AND ORDINANCE NO. 2287-89, AND ORDINANCE NO. 2313-89 OF THE CITY, BEING THE DEVELOPMENT ORDER OF THE CITY OF WEST PALM BEACH APPROVING THE "DOWNTOWN UPTOWN" DEVELOPMENT OF REGIONAL IMPACT; APPROVING A SITE PLAN PURSUANT TO SECTION 3, PARAGRAPH 41 OF ORDINANCE NO. 2268-89 AFORESAID, AS AMENDED, DECLARING THE SITE PLAN OF A RETAIL AND OFFICE MIXED USE BUILDING TO BE CONSISTENT WITH THE COMPREHENSIVE PLAN OF THE CITY AND WITH CITY CODE SECTION 33-15 AND SECTION 33-48 REQUIREMENTS; IDENTIFYING CERTAIN CONDITIONS; PROVIDING A SEVERABILITY CLAUSE; PROVIDING AN EFFECTIVE DATE; AND FOR OTHER PURPOSES.

* * * * *

WHEREAS, the City Planning Board and the City Commission have undertaken a Level III Site Plan Review pursuant to Section 3, Paragraph 41, of Ordinance No. 2268-89 of the City Commission of the City of West Palm Beach, Florida, as amended, hereinafter the "Development Order", for the "Proposed Retail/Office"; and

Appendix Q

WHEREAS, the City Planning Board has reviewed and recommended approval of the "Proposed Retail/Office Site Plan", being drawing 95-01, revised March 27, 1995, and drawn by Kilday and Associates, hereinafter referred to as the "Site Plan"; the "Planting Plan", being drawing 95-01, revised March 27, 1995, and drawn by Kilday and Associates; and "Floor and Elevation Plans", being drawing 95-105, dated February 13, 1995, and drawn by Jones and Song, Architects and Planners, Inc.; copies of which are on file in the Planning, Zoning and Building Department, with the inclusion of specified conditions and limitations contained in this Resolution.

NOW THEREFORE, BE IT RESOLVED BY THE CITY COMMISSION OF THE CITY OF WEST PALM BEACH, FLORIDA that:

***SECTION 1*:** The City Commission hereby finds that the Site Plan for the construction of the 21,000 square feet of retail space and 54,310 square feet of office space "Proposed Retail/Office" meets the Development of Regional Impact conditions of approval and is consistent with the existing zoning classifications City Center General Commercial (CC3) district and Commercial Planned Development (CPD) district, and is consistent with the Comprehensive Plan of the City of West Palm Beach.

* * * *

APPENDIX R — LETTER OF THE CITY OF WEST PALM BEACH DATED AUGUST 4, 1995

The City of
West Palm Beach
"The Orchid City"

NANCY M. GRAHAM
Mayor
P.O. Box 3366
West Palm Beach, Florida 33402
Tel: 407/659-8025
Fax: 407/659-8066

August 4, 1995

Mr. Bert Moerings
Advantage West Palm Beach, Inc.
1001 Alternate A1A
Jupiter, FL 33477

Dear Bert:

On behalf of the City, I would like to take this opportunity to thank you and your Company, Advantage West Palm Beach, Inc. for your participation and support of the City's efforts to assemble the Downtown/Uptown properties, and to promote a Convention Center and high quality redevelopment project in the Downtown/Uptown area.

During the past year that the City and your Company have been cooperating on these efforts, there has been significant progress, including:

- Settlement of the eminent domain litigation relating to Okeechobee Boulevard.

- Funding of a $15,000,000 City loan for acquisition of the project.

Appendix R

- Closing on the SKOP Bank property.

- Submission of a highly competitive proposal for the development of a Convention Center.

In short, there has been a lot of cooperation and a great deal of progress. However, as we are both aware, more remains to be accomplished.

As you know, from time to time, we have had discussions about the various holdings of Advantage West Palm Beach, including real estate and development rights. During these discussions, there have been some differences of opinion concerning the extent and value of these rights. At this time, it is the City's wish to move away from our differences of opinion and in this regard I would like to provide you with the City's assurance that the City wishes, and intends, to treat you and your Company fairly in any future transactions we may have concerning the city's acquisition of your rights.

It is the City's intention, under any such acquisition process, to pay your Company fair market value for any and all rights which your company may own and which are necessary for assembly and development of the Downtown/Uptown project.

I hope that we can continue to cooperate together and that, notwithstanding our differences of opinion on these matters, we can work together to achieve a truly landmark project in the Downtown/Uptown area which will indeed serve as a gateway to the city.

Sincerely,

s/ Nancy Graham
Nancy M. Graham
Mayor

cc: Michael J. Wright, City Administrator
Patrick N. Brown, City Attorney
Robert Sanders, Deputy City Attorney

APPENDIX S — CONTRACT DATED JUNE 6, 1996

ADVANTAGE WEST PALM BEACH, INC., of West Palm Beach, Florida (Ph._____) as seller, and BADCOCK'S ECONOMY FURNITURE STORE, INC., of 512 Clematis Street, West Palm Beach, FL 33401 (Ph. 659-1170) as buyer, hereby agree that the seller shall sell and the buyer shall buy the following described property UPON THE TERMS AND CONDITIONS HEREINAFTER SET FORTH, which shall include the STANDARDS FOR REAL ESTATE TRANSACTIONS set forth on reverse side of this contract.

1. LEGAL DESCRIPTION of real estate located in Palm Beach County, State of Florida: See attached legal description.

Personal property included: Buyer and Seller agree that this transaction is for $16.00 per square foot (14,113 sq.ft.) for the roadbeds and $2.40 a square foot for absolute assignment of development rights to the roadbeds and the adjoining property.

2. PURCHASE PRICE Three Hundred Sixty Nine Thousand Eight Hundred Dollars.

Method of Payment:

(a) Deposit to be held in trust by
Butler & Brown, P.A. Trust Acct. $ 10,000.00

* * *

(d) Cash, certified or local cashier's check on closing and delivery of deed (or such greater or lesser amount as may be necessary to complete payment of purchase price after credits, adjustments and prorations).	$359,800.00
TOTAL	$369,800.00

3. TIME FOR ACCEPTANCE: If this contract is not executed by the seller and buyer on or before June 10, 1996, the aforesaid deposit shall be, at the option of the buyer, returned to him and this agreement shall be null and void. The date of contract, for purposes of performance, shall be regarded as the date when the last one of the seller and buyer has signed this contract.

4. CLOSING DATE: This contract shall be closed and the deed and possession shall be delivered on or before the 1st day of July, 1996, unless extended by other provisions of this contract.

5. PRORATIONS: Taxes, insurance, interest, rents and other expenses and revenue of said property shall be prorated as of the date of closing.

6. EVIDENCE OF TITLE: (Check ☐ (1) or ☒ (2)) Within 20 days from the date of this contract, the seller shall, at his expense, deliver to the buyer or his attorney in accordance with Standard A on reverse side either: (1) abstract (2) Title guarantee.

Appendix S

7. CONVEYANCE: Seller shall convey title to the aforesaid property to the buyer by statutory warranty deed subject to matters contained in this contract and taxes for the year of closing.

8. RESTRICTIONS, EASEMENTS, LIMITATIONS: Buyer shall take title subject to: (a) Zoning, restrictions, prohibitions, and requirements imposed by governmental authority, (b) Restrictions and matters appearing on the plat or common to the subdivision, (c) Public utility easements of record, provided said easements are located on the side or rear lines of the property, (d) Taxes for year of closing, assumed mortgages, and purchase money mortgages, if any, (e) Other: those of record. Seller warrants that there shall be no violations of building or zoning codes at the time of closing.

9. DEFAULT BY BUYER: If buyer fails to perform any of the covenants of this contract or decides not to complete transaction, all money paid as an initial earnest money deposit pursuant to this contract by buyer as aforesaid, shall be returned, if prior to closing.

10. DEFAULT BY SELLER: If the seller fails to perform any of the covenants of this contract, the aforesaid money paid by the buyer, at the option of the buyer, shall be returned to the buyer on demand; or the buyer shall have only the right of specific performance.

11. TYPEWRITTEN OR HANDWRITTEN PROVISIONS: Typewritten or handwritten provisions inserted in this form shall control all printed provisions in conflict therewith.

Appendix S

12. OTHER AGREEMENTS: No agreements or representations, unless incorporated in this contract, shall be binding upon any of the parties.

13. SPECIAL CLAUSES:

Buyer is aware that said property may be subject to eminent domain proceedings by the City of West PALM BEACH.

Date Executed by Buyer
June 6, 1996

WITNESSES: (Two are required)

s/ [illegible]

s/ [illegible]

s/ James C. Baber, III *(SEAL)*
JAMES C. BABER, III,
President
BADCOCK'S ECONOMY
FURNITURE STORE, INC.
Buyer

* * *

Appendix S

Date Executed by Seller
June 6, 1996

WITNESSES: (Two are required)

s/ [illegible]

s/ [illegible]

s/ Bert J. Moerings *(SEAL)*
BERT MOERINGS, on behalf of ADVANTAGE WEST PALM BEACH, INC.
Seller

* * *

Appendix S

Between ***ADVANTAGE WEST PALM BEACH, INC.***, SELLER and ***BADCOCK'S ECONOMY FURNITURE STORE, INC.***, BUYER.

The Purchase Price breaks down as follows:

Real Property—14,113 square feet at $16.00 per foot	$225,808.00
Commercial Development Rights — 60,000 square feet at $2.40 per foot.	144,000.00
Total	$369,808.00

The Development Rights are Phase IA development rights as defined in the Downtown\Uptown Development of Regional Impact, Development Order City of West Palm Beach Ordinance Numbers 2268-89, 2297-89 and 2313-89. The Development Rights shall be conveyed by Absolute Assignment.

The Deposit of $10,000.00 will be held trust by Buyer's attorney, Butler & Brown, P.A. Trust Account within (5) five business days of the execution of this Agreement. If the deposit is not placed in trust in accordance with this paragraph, then this agreement shall be terminated and deposit money received shall be returned to Buyer.

This contract shall be closed with 14 days of execution by Buyer and Seller. In the event Buyer is unable to close on "Block 57" within the time described herein then this agreement shall be terminated and deposits shall be returned to Buyer.

Appendix S

Gonzalez Associates, Inc. (a Florida corporation) is acting as Broker for Seller and will receive a commission equal to 7% of the Purchase Price earned and payable upon closing of this transaction.

Dated this 6th day of June, 1996.

BY s/ James C. Baber, III
JAMES C. BABER, III,
PRESIDENT
BADCOCK'S ECONOMY
FURNITURE STORE, INC., Buyer

BY s/ Bert J. Moerings
BERT MOERINGS, PRESIDENT
ADVANTAGE WEST PALM
BEACH REALTY, INC.
Seller.